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In the

UNITED STATES

COURT OF APPEALS

for the

NINTH CIRCUIT

No. 22331

NANCY JEWELL CROSS, for herself and for all persons like interested,

Plaintiff and Appellant,

v.

JOHN A. BRUNING, County Clerk of San Mateo County, and

FRANK M. JORDAN, Secretary of State of California,

Defendants and Appellees.

OPENING BRIEF AND MOTION FOR SUMMARY REVERSAL, APPROPRIATE COMPOSITION OF A THREE-JUDGE DISTRICT COURT, EXPEDITED HEARING, AND LEAVE TO FILE A PETITION FOR WRIT; PETITION FOR WRIT; AND MEMORANDUM OF POINTS AND AUTHORITIES

FILED

NOV 13 1967

WM. B. LUCK, CLERK

NOV 15 1967

Dr. Nancy Jewell Cross
1902 Palo Alto Way
Menlo Park, California 94025

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To the Honorable United States Court of Appeals:

In action of title foregoing filed October 4, 1967 as No. 47974 in the United States District Court for the Northern District of California, Nancy Jewell Cross herewith respectfully submits her Opening Brief on appeal noticed October 30, 1967 from the Order filed October 9, 1967 denying a three-judge District Court pursuant to 28 U.S.C. §2281 "for want of a substantial federal question", and moves this Court for summary reversal thereof, for appropriate composition of a three-judge District Court, for expedited hearing, and for leave to file a petition for a writ --with this paper following considered as the petition.

The appeal, motion, and petition are based on the Complaint, Order, and other papers of the Record from the United States District Court, this paper, and such further papers and evidence as plaintiff-appellant may file or otherwise submit to the Court before its final determination of the matters herein.

I. Statutory Provisions Believed to Sustain the Jurisdiction

Statutes believed to sustain the jurisdiction of the United States District Court are United States Code, Title 28, Sections 1331, 1343, 2201, 2202, 2281, 2284, and 2461; Title 42, Sections 1981, 1983, 1985, 1986, and 1988; and Title 18, Section 241. The statutes, and also United States Constitution provisions, invoked were before the United States District Court in the Complaint. Pages 1 - 2 of the Complaint and Record.

The Court of Appeals has jurisdiction of the appeal by United States Code, Title 28, Section 1291. It has writ jurisdiction in the action by 28 U.S.C. Section 1651.

Nancy Jewell Cross, an inhabitant, citizen, taxpayer, and duly qualified elector of the United States, California, and San Mateo County, brought this action for herself and all persons like interested, to maintain her and their rights of federal citizenship in the election of Representative to Congress from San Mateo County against conditions of candidacy, process, and selection therefor applied and threatened by Frank M. Jordan, Secretary of State of California, and John A. Bruning, County Clerk of San Mateo County, defendants herein, acting under color of general state law in conflict with United States Constitution Article I, Section 2, Clause 2, Article VI, Sections 2 and 3, and Amendments I, IX, XIII, and XIV.

Plaintiff seeks judicial decree enjoining the enforcement of California Elections Code Sections 7201, 7203, 6551, 6552, 6553, 6555, 6651.5, 6655, 6830, 6831, 6832, 6833, 11,503, 11,560, 11,563, 11,565, 12,041, 12,053, and 12,054, enjoining or setting aside and vacating nomination and election proceedings and results pursuant thereto since the filing of this action, declaring conditions of candidacy, process, and selection for Representative to Congress permissible under the United States Constitution to defendants, and granting associated relief.

Conditions of candidacy, nomination, and election for Representative to Congress from San Mateo County in addition to those of being a registered elector of California and San Mateo County (California Constitution, Article II, Section 1; California Government Code, Sections 274 and 275, and California Elections Code, Sections 20 and 100) and those of having attained the age of 25 years, of

having been a citizen of the United States 7 years, of being an inhabitant of the State where chosen, and of being bound by oath or affirmation to support the United States Constitution (U.S. Constitution, Article I, Section 2, Clause 2, and Article VI, Sections 2 and 3),

a. Vary conditions of candidacy, process, and selection among persons equally qualified for office and against the relative popularity of persons listed on the ballot with electors, according to whether a candidate or person desiring to be a candidate has chosen one of the two State Parties on her or his voter registration form, or not. Thus one person desiring to have his name on the ballot for the office of Representative to Congress was excluded because in 8 days for collecting signatures on a nominating petition he obtained only 405 instead of 500, whereas all the other persons taking out nominating papers were required to have only 40 signatures in the same period because they had specified "Democratic" or "Republican" on their voter registration forms! Likewise arbitrarily discriminating, the scheduled process requires any person not so registered as an elector to be first or second in popularity among electors in order to qualify for place on subsequent election ballot, but it assures a place on such subsequent ballot to a person of each State Party--the one of each such party polling the most votes, regardless of such persons' relative popularity with electors. Quite possibly candidates of greater relative popularity with electors will be denied listing on subsequent election ballot.

b. As a condition of obtaining nomination papers of actual value about 25¢ (this distinguished from filing them after collection of signatures, or from receiving a certificate of election or nomination

after an election), require payment of a percentage of the salary from the United States Treasury to a Representative to Congress. The amount is 1% of $30,000, or $300. The payment is nonrefundable. Thus the man who was denied a place on the ballot because he obtained only 405 signatures instead of 500 lost $300 he was required to pay to obtain the forms for his efforts. The $300 fee for nomination papers required to proceed toward the office of Representative to Congress prohibits the listing on the ballot and application for forms by persons qualified by the Article provisions of the United States Constitution heretofore cited and, contrary to the Amendments thereof cited,[1] highly discriminates against persons of present economic status and sex and races particularly lacking fair representation and effective legislative participation and voice for their concerns, and particularly needed in Congress for Congress's maximum competence to its legal jurisdiction and functions.

c. As pre- and post-conditions and punishments of candidacy as such, require oaths to statements of political character and information of lawful private affairs, associations, and relations. Failure to make the disclosures and political declarations under oath on official forms and file them by required times prevents issue of nomination papers for present and future elections, causes refusal of certificates of nomination and election for which a person has qualified by election results, and/or imposes criminal liability! These oath conditions provide means at the hand of the State for interminable harassments to intimidate political independence, and advocacy of ideas and support of candidates not already in office or favoring continuance of incumbencies. Not all persons qualified

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[1] And also to California Constitution, Article I, Section 24:
"No property qualification shall ever be required for any person to vote or hold office."

for Representative to Congress by the United States Constitution find these oaths consistent with loyalty thereto and personal integrity. These State-imposed conditions are prohibitive of their candidacy, occupation of the office, and contributions of character to Congress.

For correction of conditions a, b, and c foregoing, Nancy Jewell Cross duly and timely sought administrative remedies when call of election was imminent. The first response to letters she presented to County Clerk John A. Bruning and mailed to Governor Ronald Reagan on July 7, 1967 was press release from the Attorney General's office on September 29, 1967. Determing the inadequacy of the response to the matters raised, she as speedily as possible thereafter prepared and prior to the scheduled first day of issuing nomination papers filed the Complaint of this action and asked the Law and Motion Judge of the United States District Court for a restraining order. After a few minutes' consideration of the Complaint and papers for restraining order, and without permit of hearing to plaintiff, he refused the request.

The Clerk of the District Court on his own initiative from the request in the Complaint for a three-judge District Court independently on the same day, according to the Docket (Record, page 51), submitted the Complaint to the same judge for consideration of the request for a three-judge District Court. He without motion from or notice or hearing to plaintiff in the meantime on October 9, 1967 filed an Order denying a three-judge District Court pursuant to 28 U.S.C. §2281 "for want of a substantial federal question". (R., p.48.)

Over the filing of the suit John A. Bruning acting in concert and conspiracy with Frank M. Jordan issued and filed nomination papers under conditions and processes objected to by plaintiff and violating her and others' rights by the United States Constitution in its provisions aforesaid and has planned and is in process of conducting primary and special elections on November 14 and December 12, 1967 from candidacies truncated from what they would be in respect of the United States Constitution and with selection of survivors from one election to the next subordinating popularity of candidates with the electorate to State Parties' promotion.

For further statement and particulars of the facts, law invoked and involved, relief sought, form of Complaint, and proceedings, plaintiff adopts here as if fully set out, the Complaint and Record, at Record pages 1-46 and 1-51.

III. Specification of Errors

Appellant designates the following as errors by the District Court:

1. Refusal of restraining order--and thereby and thence of order to show cause and temporary injunction, and acceleration of action.
2. Denial of a three-judge District Court.
3. Denial of existence of a substantial federal question.
4. Denial of day in the District Court.

In addition to substantive error in the judicial acts and omissions relative to the papers presented in themselves, procedural error to the degree of denial of due process of law by the Fourteenth Amendment occurred in the District Court. The substantive result

might well have been different had the District Court accorded fair process.

IV. Relief Asked Of This Court and Need for Expedited Hearing

The Court will see from the foregoing that matters of public importance to be determined speedily are in active controversy here. If ultimate decree in the action concludes discrepancy between State statutes and election processes heretofore planned by defendants, results of the elections may be expected to be set aside and declared void to the extent that the elections and proceedings therefor are not timely enjoined. In expenditures of tax-collected dollars, in time and attention of electors in preparing for voting and attending the polls, and in outlays by candidates, substantial expenditures which may be futile can by speedy determination of this action be avoided and put into elections with conditions of candidacy, processing, and selection consistent with the United States Constitution to give the people of San Mateo County needed representation in Congress according to law.

Plaintiff asks this Court to reverse the Order in this action filed on October 9, 1967, to direct the convening of a three-judge District Court for the action, to include judges of both sexes on the panel and insofar as practicable vary each judge from each other by sex or race, to issue or direct the District Court to issue a restraining order and order to show cause why a temporary injunction should not issue, and to grant such other and further remedy and relief as this Court finds appropriate in the facts and circumstances.

Respectfully submitted,

Nancy Jewell Cross

MEMORANDUM OF POINTS AND AUTHORITIES

And Concise Argument of the Case

Reference is made to the foregoing Motion, Petition, and first part of Opening Brief, and to the Record as a whole and the Complaint--on pages 1-46, and Order--on page 48, in particular.

1. Court of Appeals Jurisdiction and Remedy

The Court of Appeals has jurisdiction of the appeal by 28 U.S.C. §1291. The Order filed October 9, 1967 is final because it disposes of the action in substance entirely. The denial of a three-judge District Court is on a ground which refutes any basis for federal court relief by the action. Without arguing the Order nothing possibly is left of plaintiff's action so far as the District Court is concerned. The Order decides the merits not just with respect to a three-judge District Court, but entirely for a District Court of any composition.

Idlewild Corporation v. Epstein (1962) 370 US 713.

Summary reversal on motion after appeal to this Court is supported in a case analogous:

Marshall v. California Department of Social Welfare (CA 9, August 18, 1967) No. 22053; U.S.D.Ct. N.D. Calif. No. 47401).

Should the Court of Appeals for any reason find remedy by writ more appropriate, its jurisdiction is by 28 U.S.C. §1651.

See Stratton v. St. Louis Railway (1930) 282 US 10 at 14-18. (Mandamus under a predecessor to the present 3-judge statute.)

2. Federal Supremacy and Preemption of Subject

Through Article VI, Section 2 and the Fourteenth Amendment, the United States Constitution is efficiently supreme on elections and political processes. The following cases illustrate this.

United States v. Manning (1963) 215 F Supp 272 at (1,2) on 277 and (15-18) on 287-288

Harper v. Virginia State Board of Elections (1966) 383 US 663

South Carolina v. Katzenbach (1966) 383 US 301

Harman v. Forssenius (1965) 380 US 528

Lucas v. 44th General Assembly of Colorado (1964) 377 US 713.

Ordinarily States conduct congressional elections. In these and other elections federal courts have jurisdiction to effect right process against state officers.

Munoz v. Amador (Texas 1964) 230 F Supp 591.

A federal district court should set aside a local election which it should have enjoined because of a deprivation of civil rights. Hamer v. Campbell (CA 5 1966) 358 F2d 215

The state statutes and process whose enforcement plaintiff seeks to enjoin and whose results she seeks to have vacated and set aside violate clear preemption in the United States Constitution in Article I, Section 2, Clause 2; Article VI, Sections 2 and 3, and Amendment XIV, Sections 2 and 3, on Representatives to Congress and their qualifications.

3. Invidious Classifications and Statutory Forfeitures

Governmentally fair-and-even-handed opportunity for participation in public offices is a right and attribute of citizenship in a democracy and republic. Systematic under-representation, and token representation, of persons by sex and race constituting a majority of the adult population, in elective and public policy-making offices evince the exercise of governmental power discriminatorily to promote a minority by sex and race at other people's

expense. Exhibits E, F, G, H, and I, at pages 27-30, of the Complaint and Record illustrate one-third of the adult population by sex and race to be economically and politically privileged far and above the rest. The other 2/3 has but 5% of the membership of Congress! In order to avoid not only direct but indirect invidious discrimination by sex, race, and wealth, and enable persons of different status and consequently different views to have effective voice for and redress of their grievances and make their unique contributions to national policies, statutes in constitutionally sensitive areas of political expression and representation, as well as in education and licensing, must be narrow to the purpose of government and avoid consequential and predictable as well as express classifications or discriminations among people which are not clearly relevant and justifiable to government.

Thompson v. Shapiro (U.S.D.Ct. D. of Connecticut, June 19, 1967, Civil No. 11,821). A copy is in the CA 9 file in No. 22053, Marshall v. California Department of Social Welfare.)

Harper v. Virginia State Board of Elections (1966) 383 US 663

Carrington v. Rash (1965) 380 US 89 at 93 to top of 94, and 96

Griffin v. County School Board of Prince Edward County (1964) 377 US 218 at 227-228

Anderson v. Martin (1964) 375 US 399

Bolling v. Sharpe (1955) 347 US 497

McDonald v. Key (1955) 224 F2d 608, cert. denied 350 US 895.

The statutes abjured by plaintiff and acts and omissions of defendants pursuant thereto find analogy in cases where federal courts have stricken devices contrary to equality of citizenship and even-handedness of States with respect to the people. Here California legislators would statutorily forfeit participation in elective offices against persons who have not given at least lip-

service to their incumbencies by registering to a State party as electors and compel disclosure of names of supporters of their opposition as a condition of its access to the ballot! Consistently with the First, Ninth, Thirteenth, and Fourteenth Amendments, attributes of federal citizenship are not so easily done away with!

It is one thing for a political party, or church, to exact oath and conformity of persons who have chosen its umbrella. Ray v. Blair (1952) 343 US 214. It is quite another for a State to compel conformity to a party, or among specified parties, or harass the inhabitants of the State from following political ideas and associations not of its legislators' choosing.

Reitman v. Mulkey (1967) 387 US 369

Cox v. Louisiana (1965) 379 US 536 at 553-558

Elfbrandt v. Russell (1966) 384 US 11 at 18-19

DeGregory v. Attorney General of New Hampshire (1966) 383 US 825

Bates v. City of Little Rock (1960) 361 US 516

Talley v. California (1960) 362 US 60

NAACP v. Alabama (1958) 357 US 449

See Griswold v. Connecticut (1965) 381 US 479 at 485

See Kennedy v. Mendoza-Martinez (1963) 372 US 144

See Afroyim v. Rusk (1967) 387 US 253.

A State legislature may not vitiate the elected choice of the people by political test of the individual chosen.

Bond v. Floyd (1966) 385 US 116.

The reasoning applies equally whether the test is after the final election or, as here, before it in conditions of issue of nomination papers, for listing of names on ballots, and issuing certificates of nomination and election.

4. Three-Judge District Court

Federal court jurisdiction and substantiality of claims with reference to the United States Constitution in the action here will have clearly appeared ere now. The Complaint otherwise fulfills criteria for a three-judge District Court.

Marshall v. California Department of Social Welfare (CA 9, August 18, 1967 No. 22053; U.S.D.Ct. N.D. Calif. No. 47401)

Borden Co. v. Liddy (CA8 1962) 309 F2d 871 at 876-877

Jordan v. Silver (1965) 241 F Supp 576, (1965) 381 US 415

Baker v. Carr (1959) 175 F Supp 649, (1961) 369 US 186

United States v. Mississippi (1965) 380 US 128 at 130-131

Zemel v. Rusk (1965) 381 US 1 at 5-7

Anderson v. Martin (1964) 375 US 399

Idlewild Corporation v. Epstein (1962) 370 US 713

Hostetter v. Idlewild Corporation (1964) 377 US 324

Idlewild Corporation v. Rohan (S.D.N.Y. 1960) 188 F Supp 434

40 California State Bar J. (1965) 487 at 499

The Complaint should also be tested by cases illustrating exceptions to the general rule for a three-judge District Court. It stands sturdily, plaintiff submits, in merit for a three-judge District Court.

Moody v. Flowers (1967) 387 US 97

Pennsylvania P.U.C. v. Pennsylvania Railroad Co. (1965) 382 US 281

Turner v. City of Memphis (1962) 369 US 350

Bailey v. Patterson (1962) 369 US 31

Ex parte Poresky (1933) 290 US 30

See Kapral v. Jepson (1967) 271 F Supp 74.

Respectfully submitted,

Nancy Jewell Cross

Nancy Jewell Cross

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United States Supreme Court

Stratton v. St. Louis Railway (1930) 282 US 10 at 14-18 8

Ex parte Poresky (1933) 290 US 30 12

Ray v. Blair (1952) 343 US 214 11

Bolling v. Sharpe (1955) 347 US 497 10

NAACP v. Alabama (1958) 357 US 449 11

Bates v. City of Little Rock (1960) 361 US 516 11

Talley v. California (1960) 362 US 60 11

Bailey v. Patterson (1962) 369 US 31 12

Turner v. City of Memphis (1962) 369 US 350 12

Idlewild Corporation v. Epstein (1962) 370 US 713 8, 12

Kennedy v. Mendoza-Martinez (1963) 372 US 144 11

Anderson v. Martin (1964) 375 US 399 10, 12

Griffin v. County School Board of Prince Edward County (1964) 377 US 218 at 227-228 10

Hostetter v. Idlewild Corporation (1964) 377 US 324 12

Lucas v. 44th General Assembly of Colorado (1964) 377 US 713 9

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Carrington v. Rash (1965) 380 US 89 at 93 to top of 94, and 96 10

United States v. Mississippi (1965) 380 US 128 at 130-131 12

Harman v. Forssenius (1965) 380 US 528 9

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Zemel v. Rusk (1965) 381 US 1 at 5-7 12

Pennsylvania P.U.C. v. Pennsylvania Railroad Co. (1965) 382 US 281 12

South Carolina v. Katzenbach (1966) 383 US 301 9

Harper v. Virginia State Board of Elections (1966) 383 US 663 9,10

DeGregory v. Attorney General of New Hampshire (1966) 383 US 825 11

Elfbrandt v. Russell (1966) 384 US 11 at 18-19 11

Bond v. Floyd (1966) 385 US 116 12

Moody v. Flowers (1967) 387 US 97 12

CERTIFICATE OF RECOGNITION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Nancy Jewell Cross

Nancy Jewell Cross

AFFIDAVIT OF SERVICE OF COPIES

I, Nancy Jewell Cross, being first duly sworn, depose and say: that on Friday, November 10, 1967 I mailed three copies of my Opening Brief etc. in No. 22331 to each of the following:

Thomas C. Lynch, Attorney General
Charles A. Barrett, Assistant Attorney General
August J. Ginocchio, Deputy Attorney General
Fifth Street & Capitol Mall
Sacramento, California 94814

Keith C. Sorenson, District Attorney
John B. Segall, Deputy District Attorney
Hall of Justice and Records
Redwood City, California 94063

and deposited the two envelopes, sealed and with first class postage fully prepaid, addressed as snown above, in the United States mail at Palo Alto, California, and that there is regular pick up at the place of mailing and delivery at the places addressed by United States mail.

s/ NANCY JEWELL CROSS
Nancy Jewell Cross

Subscribed and sworn to before me,

this 10th day of November 1967,
at
Palo Alto

s/ ARTHUR W. ELLIS (SEAL)

Notary Public in and for the County
of Santa Clara, State of California.

(Stamp:)

Arthur W. Ellis
Notary Public - California
County of Santa Clara

No. 22,337

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BRICKLAYERS & MASONS INTERNATIONAL UNION,
LOCAL NO. 3, AND
FRANK S. LLEWELLYN, SECRETARY,

Respondents.

**On Petition
for Enforcement of an Order of the
National Labor Relations Board**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

FILED
FEB 23 1968
WM B LUCK, CLERK
FEB 23 1968

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,337

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BRICKLAYERS & MASONS INTERNATIONAL UNION,
LOCAL NO. 3, AND
FRANK S. LLEWELLYN, SECRETARY,

Respondents.

**On Petition
for Enforcement of an Order of the
National Labor Relations Board**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order

(R. 41, 30-31)[1] issued against Bricklayers & Masons International Union, Local No. 3, and Frank S. Llewellyn, Secretary (hereinafter referred to as "respondents" or "the Union") on December 30, 1966. The Board's decision and order are reported at 162 NLRB No. 46. This Court has jurisdiction of the proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[2] the unfair labor practices having occurred in Spokane, Washington. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that respondents violated Section 8(b)(3) of the Act by insisting to impasse upon the inclusion of a non-mandatory subject of bargaining in its contract with the employer after agreement had been reached on all other items of bargaining. The facts upon which this finding was based are summarized below.

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[1] References to the pleadings reproduced as "Volume 1, Pleadings," are designated "R." References to the stenographic transcript of the hearing filed with the Court are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The pertinent statutory provisions are reprinted, *infra*, p. A-1-A-3.

A. Background: Bargaining history of the parties

The Associated General Contractors of America is a national employers' association. The Eastern Washington Builders Chapter is a Spokane affiliate (hereafter referred to as "AGC"), comprised of employers engaged as contractors in the building and construction industry in the States of Washington, Idaho and Oregon (R. 21). The Mason Contractors Association, Spokane Chapter No. 855 (hereafter "MCA") is an association of employers engaged in masonry and bricklaying in the construction industry in the same geographical area as AGC (R. 22-23; G.C. Exh. 7). On February 21, 1962, AGC and MCA, acting jointly as employers, entered into a collective bargaining agreement with the Union (R. 23; G.C. Exh. 6).[3] The agreement stated that it would remain in effect until December 31, 1964, at which time it would be terminated, modified, or amended upon proper notice (*Ibid.*). On October 28, 1964, the Union sent written notification of a desire to terminate the existing contract and to meet in order to negotiate a new agreement (R. 23; Tr. 22, G.C. Exh. 2). On October 30, 1964, AGC acknowledged receipt of this notice and informed the Union that it was willing to meet and negotiate a new agreement as the Union had requested (R. 23; Tr. 23, G.C. Exh. 3).

In November or December 1964, MCA notified AGC that it wished to negotiate its own contract with the Union rather than negotiating jointly with AGC as they had done in the past

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[3] The two employer associations had bargained jointly since 1958 or 1959. Before this time, AGC had bargained alone with the Union for some six or seven years (R. 38-39; Tr. 38-39).

(R. 23; Tr. 25). Immediately after receiving this notice from MCA, Charles Hively, Executive Secretary of AGC, informed respondent Llewellyn, Secretary of the Union, that AGC wanted to negotiate with the Union after conclusion of the negotiations with MCA[4] (R. 23; Tr. 25-26, 27).

B. The contract negotiations between AGC and the Union; an impasse reached on a contract provision

On about February 1, 1965, MCA and the Union reached an agreement on their contract (R. 24; Tr. 40, G.C. Exh. 7). Upon being informed of this fact, Hively requested a meeting with Secretary Llewellyn and Otho Hood, president of the Union, in order to negotiate AGC's contract (R. 24; Tr. 26, 28). The meeting was held on February 11, at which time Llewellyn and Hood told Hively that the Union's contract with MCA was the same, but for a change in wages, as their 1962 contract (R. 24; Tr. 27-28). The Union's new contract with MCA, however, contained the following provision (R. 24; G.C. Exh. 7):

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[4] Shortly thereafter, on January 25, 1965, the national association authorized AGC to merge with the other Spokane chapter, which was comprised of contractors in highway and heavy construction work. Accordingly, the members of AGC assigned their bargaining rights to the single chapter, called the Inland Empire Chapter of the Associated General Contractors (herein "Inland Empire"). Hively became assistant executive director of Inland Empire (R. 23-24, 40-41; Tr. 20-22, 37-38, 68-75, Resp. Exh. 1).

Article VI — OTHER EMPLOYERS

> SECTION 1. The Union agrees that during the life of this Agreement they will not furnish members to any Employers other than those parties to this agreement, under conditions more favorable to such Employers than those herein established.
>
> SECTION 2. The Employer agrees that in the contracting or sub-contracting of any work coming within the jurisdiction of this Union the Employer shall do business only with a person, firm or corporation party to this agreement.
>
> SECTION 3. In the event the Employer violates this Article he shall pay the Union a sum equivalent to the initiation fees and dues the Union would have received for each employee not included in this bargaining unit, had this article been complied with under the Union security provision of this Agreement.

Hively stated that AGC would not accept the provision contained in Article VI, Section 3 of the MCA contract (R. 24; Tr. 28-29). About February 19, 1965, and at various times thereafter, Hively notified Llewellyn that AGC was willing to enter into a contract with the Union identical to the MCA contract except for the Article VI, Section 3 provision. There was no disagreement by the parties on any other provision in the contract (R. 25; Tr. 32-33).

On July 9, 1965, Hively wrote to Llewellyn in order to "make clear [AGC's] desire to conclude as speedily as possible a new agreement to replace the agreement in accordance with the opening letter from [the Union], dated October 8, 1964" (R. 25; G.C. Exh. 4). Hively's letter added that AGC

has consistently refused to accept contract provisions which included the language of Article VI, Section 3 since it considered such a provision to be an unlawful "exclusion of fair competition in our area." (*Ibid.*). On July 16, 1965, Llewellyn sent a reply to Hively stating that the Union would be glad to meet with representatives of AGC in an effort to resolve the differences between them concerning the new contract (R. 25; G.C. Exh. 5).

On July 22, 1965, Hively and Llewellyn discussed the matter again and each acknowledged that the only issue between them involved Article VI, Section 3 of the proposed contract (R. 25: 83-84). Llewellyn insisted that the provision was legal while Hively maintained that it was not (R. 25: Tr. 84). Finally, Hively again informed Llewellyn that the AGC was prepared to sign the agreement only if Article VI, Section 3 was omitted (R. 25; Tr. 84).

II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the foregoing facts, the Board concluded that the damages provision insisted upon by the Union was a non-mandatory subject of bargaining and that the Union's insistence to impasse upon the inclusion of this provision in the contract violated Section 8(b)(3) of the Act (R. 38, 30). The Board's order requires the Union to cease and desist from insisting that AGC, or its successor, Inland Empire, accept this particular provision of the contract as a condition precedent to its entering into a collective bargaining agreement (R. 41, 30). Affirmatively, the order requires the Union to bargain, upon request, with AGC or Inland Empire, and, if an understanding is reached, embody such an understanding in a signed contract without requiring AGC or Inland Empire to agree to

the inclusion of the disputed contract provision. The Union is further ordered to post the appropriate notices (R. 41, 30-31).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION VIOLATED SECTION 8(b)(3) OF THE ACT BY INSISTING TO IMPASSE UPON THE INCLUSION OF A NON-MANDATORY SUBJECT OF BARGAINING IN ITS CONTRACT WITH THE EMPLOYER AFTER AGREEMENT HAD BEEN REACHED ON ALL OTHER ITEMS OF BARGAINING

A. Introduction

The law is well settled that neither the employer nor the union may condition willingness to negotiate or to contract about matters which are within the area of compulsory bargaining upon the other party's acceding to demands which are outside that area. As the Supreme Court stated in *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349:

> Read together, these provisions [Sections 8(a)(5) and 8(d)] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment.' The duty is limited to those subjects, and within that area

> neither party is legally obligated to yield. *Labor Board v. American National Insurance Co.*, 343 U.S. 395. As to other matters, however, each party is free to bargain or not bargain, and to agree or not to agree.
>
> The Company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.

In the instant case, as set forth *supra*, pp. 5-6, Hively, on behalf of the employer-members of AGC, and the Union had agreed, but for Article VI, Section 3, on all the terms of a new collective bargaining agreement covering the bricklayers and masons represented by the Union.[5] The disputed contract

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[5] Insofar as Secretary Llewellyn and President Hood denied that the negotiations with Hively concerned the bricklayers and masons, and involved only a discussion regarding tilelayers and terrazzo employees also represented by the Union, the Trial Examiner discredited their testimony. The Board adopted these findings (R. 24, 37). It is well settled that the resolution of conflicting testimony is the responsibility of the Trial Examiner and the Board; their determinations ordinarily will not be disturbed by a reviewing court. *N.L.R.B. v. Local 776, I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v. Anderson*, 206 F. 2d 409 (C.A. 9), cert. denied, 346 U.S. 938. We submit that the Trial Examiner's credibility resolutions, adopted by the Board, are entitled to affirmance here.

clause provided that any signatory employer who subcontracted work within the Union's jurisdiction to a nonsignatory employer would pay the Union a sum equivalent to the initiation fees and dues the Union would have received from each employee deprived of unit work by reason of the subcontracting. On July 22, 1965, an impasse was reached in the bargaining negotiations when the Union insisted on the inclusion of this clause in the contract.[6] Thus, the principal issue presented here is whether a contract provision of this sort is subject to the bargaining obligation established by Section 8(d) of the Act, or whether it constitutes a non-mandatory subject of bargaining about which neither party may require the other to yield. For if such a provision is a non-mandatory subject of bargaining, it follows under *Borg-Warner* that the respondents violated Section 8(b)(3) by their insistence upon the inclusion of the provision in the contract. As was said in *International Longshoremen's Ass'n v. N.L.R.B.*, 277 F. 2d 681, 683 (C.A. D.C.), "The right of the Union to urge a non-mandatory subject of bargaining ceases short of ultimate insistence." As we now show, the Board's finding that the contract provision insisted upon by respondents was a non-mandatory subject of bargaining has ample support in the law.

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[6] The Board (R. 29 n. 14) rejected the General Counsel's contention (R. 4-5) that an earlier impasse on July 9, 1965, was established by AGC's letter of that date to the Union, indicating a willingness to sign an agreement if the disputed provision was omitted (see, *supra*, pp. 5-6).

The original charge leading to the complaint was filed on May 21, 1965, and amended on September 1 (R. 3-4). The Union asserted that no unfair labor practice could be based on events occurring after the original charge. Under settled law, this assertion is without merit. *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301. See also *N.L.R.B. v. Anchor Rome Mills, Inc.*, 228 F. 2d 775, 779 (C.A. 5).

B. The damages provision insisted upon by the Union constituted a non-mandatory subject of bargaining

The Board, with the approval of this Court and other reviewing courts, has consistently held that a union violates Section 8(b)(3) of the Act by insisting, as a condition precedent to executing a collective bargaining agreement, that the employer agrees to post a bond or its equivalent to afford security against possible defaults. *N.L.R.B. v. International Hod Carriers, Building and Common Laborers Union of America, Local No. 1082,* 384 F. 2d 55 (C.A. 9) (Ely, J., dissenting), *cert. denied* __U.S. __ ; *N.L.R.B. v. Laborers & Hod Carriers Local No. 300,* 384 F. 2d 1000 (C.A. 9). And see, *Excello Dry Wall Co.,* 145 NLRB 663, enforced *sub nom. Carpenters District Council of Detroit v. N.L.R.B.,* 58 LRRM 2064 (C.A. D.C.); *Local 164, Brotherhood of Painters v. N.L.R.B.,* 293 F. 2d 133 (C.A. D.C.), cert. denied, 368 U.S. 824; *International Brotherhood of Teamsters (Conway's Express),* 87 NLRB 972, 978-979, aff'd on other grounds *sub nom. Rabouin v. N.L.R.B.,* 195 F. 2d 906 (C.A. 2). Similarly, an employer's insistence upon a performance bond or a like provision on the part of the Union is violative of Section 8(a)(5). See, *N.L.R.B. v. American Compress Warehouse, Div. of Frost-Whited Co.,* 350 F. 2d 365 (C.A. 5), cert. denied, 382 U.S. 982; *N.L.R.B v. Davison,* 318 F. 2d 550 (C.A. 4); *N.L.R.B. v. F.M. Reeves & Sons, Inc.,* 47 LRRM 2480 (C.A. 10), cert. denied, 366 U.S. 914, adjudging the employer in civil contempt of 273 F. 2d 710; *N.L.R.B. v. Dalton Telephone Co.,* 187 F. 2d 811 (C.A. 5), cert. denied, 342 U.S. 824. Here, the action of the Union – insisting upon a contract provision requiring payment by AGC to the Union of certain sums of money in the event AGC violated the subcontracting clause – falls squarely within the rationale of these cases.

As the above cases make clear, the plain language of the statute establishes that the Union's contract provision, as with performance bond provisions, is beyond the scope of mandatory collective bargaining. Section 8(d) of the Act, defining the bargaining obligations of the parties under the Act, requires bargaining with respect to "terms and conditions of employment," not guarantees running to one party in the event the other commits a breach of contract. Such guarantees bear only an attenuated relation to the "actual performance of work." *Local 164, Brotherhood of Painters v. N.L.R.B., supra*, 293 F. 2d at 135. Moreover, that "Congress [under Section 301 of the Act] has provided a remedy to be available in the event of a breach of contract" indicates that provisions designed to insure performance have been excluded from the area of mandatory collective bargaining. *Local 164, Brotherhood of Painters v. N.L.R.B., supra.*

Surely the contract provision here extends beyond the ambit of "terms and conditions of employment" in the same manner as the performance bond clauses which uniformly have been held non-mandatory subjects of bargaining. All are "security devices," imposing on the employer in the event of a breach of contract a form of sanction having little to do "with the actual performance of work or to subsequent relations." *Local 164, Brotherhood of Painters v. N.L.R.B., supra*, 293 F. 2d at 135. Moreover, payment to the Union of a sum of money equivalent to the dues and initiation fees which the Union would have received but for a breach of the subcontracting clause is primarily "related to security for the contracting party rather than relating to a benefit or security for the employees." *N.L.R.B. v. Davison, supra*, 318 F. 2d at 556. Such guarantees of financial redress for a contract breach do not concern "terms and conditions of employment" of the members of the bargaining unit within Section 8(d) and the

rationale of *Borg-Warner*. This is true, as the Board held, "[w]hether that provision be considered a performance bond . . . or as a 'liquidated damages' clause, as claimed by the Union" (R. 41). See *International Hod Carriers, Building and Common Laborers Union of America, Local 1082 v. N.L.R.B.*, *supra*, 384 F. 2d at 56.[7] In sum, the Board's holding that the Union's contract proposal is not a mandatory subject of collective bargaining is correct and in accord with prior decisions of the Board and the courts. Accordingly, the Union's insistence on the inclusion of such a clause is violative of Section 8(b)(3) of the Act.

C. Section 8(f) is inapplicable in the instant case

Before the Board, the Union asserted that the bargaining here, conducted between an employer engaged primarily in the building and construction industry and a union representing

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[7] Nor is the instant holding in conflict with the views set forth in Judge Ely's dissenting opinion in *International Hod Carriers*, cited above. Under the rationale of that opinion, whether any contract provision is within the range of Section 8(d) "should depend upon the nature and scope of the [provision] in a given case." 384 F. 2d at 61. As the performance bond provision provided assurance that "payment of wages and fringe benefits . . . would continue to flow without interruption" (384 F. 2d at 61-62), Judge Ely reasoned that it tied in so closely with those payments that it came within "terms and conditions of employment," and therefore was a mandatory subject of bargaining. As shown, the contract provision in the instant case bore no such relation to the employees' "terms and conditions of employment" – it is simply a sanction, with the benefit running to the Union's coffers, in the event that the employer breached the subcontracting clause in the contract.

employees engaged in that industry, is subject to the provisions of Section 8(f) of the Act (see *infra*, pp. A1-A2). According to the Union, the parties were negotiating a "prehire" contract within the intendment of that section and, since bargaining for such agreements is voluntary by both the employer and the union, the bargaining obligations imposed by Sections 8(a)(5) and 8(b)(3) respectively have no application. The Board found, however, that the pre-hire provision in Section 8(f) is inapplicable in the circumstances presented here. The record evidence and the legislative history of Section 8(f), we submit, fully support the Board's finding.

As set forth *supra*, p. 3), AGC recognized and began negotiating contracts with the Union in 1952. After 1958 or 1959, AGC and MCA bargained jointly with the Union. In February 1962, AGC and MCA jointly entered into a collective bargaining agreement with the Union, which continued in effect until December 31, 1964, subject to a 60-day reopening provision. Pursuant to this provision, the Union gave notification of its desire to terminate the existing contract and to negotiate a new agreement. On February 1, 1965, MCA, having decided to bargain separately, negotiated a new contract with the Union. That contract, but for the wages and the damages provision in dispute here, was similar to the previous MCA and AGC joint agreement.

AGC notified the Union of a willingness to sign an agreement identical to the new MCA contract except for the disputed provision. In discussions during the spring and summer of 1965, AGC renewed its contract offer. The Union refused to accept the successor agreement unless it contained the disputed provision.

In short, it is clear that AGC and the Union were negotiating a new contract to extend a bargaining relationship which the two parties had shared for some 13 years. It is this

continuing bargaining relationship which distinguishes the instant case from the situation which Congress intended to be encompassed under the provisions of Section 8(f) of the Act. That section reflects congressional appreciation of the unique industrial practices in the construction industry. Those practices often make it unrealisitc to require strict aherence to the statutory limitations on forming a bargaining relationship either informally or in a Board election. The contractor, for example, may need to obtain a labor agreement immediately upon, or even before, securing the construction contract and hiring his work force. The agreement, moreover, may subsist only for the duration of the project work. Congress sought to accommodate these and other industry practices to the statutory prohibition against recognizing and bargaining with a union until a representative number of employees are hired, and a majority of them have selected the union. Section 8(f)(1) provides that the labor agreement shall not be considered unlawful because "the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of the agreement. . . ." (*infra*, p. A-1). This clause permits, by allowing "prehire agreements," the creation of a bargaining relationship in circumstances which would be unlawful in other industries.

Thus, the above clause of Section 8(f) was to apply when a contractor and a union first enter into a labor agreement. As the Board noted (R. 39-40) the legislative history of Section 8(f) demonstrates that Congress was primarily concerned with validating initial attempts to create a bargaining relationship in circumstances where a timely and meaningful representation election could not be conducted. See I & II *Legislative History of the LMRDA of 1959* (GPO), pp. 424-425, 763, 777, 945-946, 1074, 1082-1083, 1715. House Speaker Rayburn, in a speech endorsing the bill, indicated

how Section 8(f)(1) eliminated the need of proving majority status in the beginning stages of the bargaining relationship (*id.* at 1578). In the Senate, then Senator John F. Kennedy explained that under the section the contractual bargaining relationship could be entered into without a showing of majority status "because of the inability to conduct representation elections in the construction industry." (*id.* at 1715). See also *N.L.R.B. v. Local 542, Operating Engineers*, 331 F. 2d 99, 105-106 (C.A. 3).

These considerations which led Congress to permit prehire agreements, however, "have no meaning in the situation where, as here, the parties are continuing an existing bargaining relationship under which employees previously have been hired" (R. 39). The Union had been the chosen bargaining agent of bricklayers and masons used by AGC's members for many years. The parties had maintained an uninterrupted contract relationship, which included union security provisions assuring union membership. There is, in other words, no uncertainty here as to the Union's representative status or the propriety of the present bargaining relationships. No reason existed, therefore, to view the parties' bargaining for a successor agreement as purely "voluntary" negotiations for a prehire agreement within the intendment of Section 8(f)(1). Accordingly, as the Board concluded, "the tests to be applied in determining the bargaining obligations of the parties herein are those generally used under Section 8(a)(5) and 8(b)(3) . . ." (R. 40).[8] Accord: *Island Construction Co. Inc.*, 135 NLRB 13, 14-16; *Local 3, I.B.E.W., AFL-CIO*, 153 NLRB 717, 724-725, enforced 362 F. 2d 232, 236 (C.A. 2).

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[8] In view of this holding, the Board did not adopt the Trial Examiner's conclusion (R. 27-29) that the usual bargaining obligations attach to negotiations for a prehire agreement under Section 8(f)(1). The Board held it was unnecessary to resolve this question (R. 40).

To avoid this application of the statute, the Union asserted that a "continuing" bargaining relationship with AGC was not in existence during the 1965 negotiations. The Board properly rejected, as wholly lacking in substance, the two grounds put forth in support of this contention.

As shown, in 1965 MCA elected not to continue bargaining jointly with AGC in negotiations with the Union. However, MCA's decision, which resulted in AGC's negotiating separately with the Union, plainly did not interrupt the Union's history of bargaining for over a decade with AGC as the spokesman of its employer-members. AGC and the Union had bargained separately for several years preceding joint negotiations. The return to separate negotiations did not alter the nature or continuity of the bargaining relationship. The union continued to represent, as before, employees of the members in the two employer associations, both of whom continued to speak for their respective members. Whether AGC and MCA acted jointly in particular negotiations had no bearing on the bargaining relationships. This merely determined whether, as a facet of the mechanics of bargaining, the employers would speak through a joint or single spokesman at the bargaining table. See *Hoisting & Portable Engineers Local Union No. 701, Operating Engineers, AFL-CIO*, 141 NLRB 469, 470-471. Compare *Detroit Newspaper Publishers Association, et al. v. N.L.R.B.*, 372 F. 2d 569, 572 (C.A. 6); *Publishers' Assoc. of New York City, et al. v. N.L.R.B.*, 364 F. 2d 293, 296 (C.A. 2), *cert. denied*, 385 U.S. 971.

Similar considerations warranted rejection of the claim that the bargaining history was destroyed by AGC's merger with the other Spokane chapter of the national association of contractors, to form a single chapter (Inland Empire). As set forth *supra*, p. 4, n. 4, AGC members assigned their bargaining rights to Inland Empire. AGC's negotiatior, Hively,

became an official of Inland Empire and continued to negotiate with the Union. Hively discussed the merger with Union representatives during negotiations, and made clear that he was fully authorized to continue speaking for the former AGC members (Tr. 37). The Union fully understood, and tendered no objections. AGC members, in sum, effectively passed on their bargaining rights and obligations when AGC merged into Inland Empire. In these circumstances, the successorship of Inland Empire did not alter the existing bargaining relationship. *Hoisting & Portable Engineers, etc., supra,* 141 NLRB at 473, n. 7; *Morgan Linen Service,* 131 NLRB 420, 421-422. Accord: *N.L.R.B. v. Downtown Bakery Corp.,* 330 F. 2d 921, 925 (C.A. 6); *Retail Clerks Int'l Ass'n v. N.L.R.B.,* 373 F. 2d 655, 657 (C.A. D.C.); *International Union, Progressive Mine Workers v. N.L.R.B.,* 319 F. 2d 428, 435 (C.A. 7), modification of Board's order reversed, 375 U.S. 396.

D. The Board's policy of not establishing one-man bargaining units has no application here

The record does not show that the contractors in AGC hired more than one unit employee during the 1965 period when negotiations were taking place. As a result, according to the Union, under the Board's policy of not establishing one-man bargaining units the contractors had no statutory bargaining obligations during the period of negotiations; therefore, the Union was not subject to its corresponding obligations.

Whether the one-man unit rule should be applied in the above manner is theoretical here. As the Board noted, the Union's argument has no factual basis (R. 40, n. 4). The

record does show that throughout 1964, within the term of the preceding contract between the parties, AGC members had employed varying numbers of bricklayers and masons, up to approximately 10 such employees during a given month. (Tr. 45, 53-55). This is consistent with the Board's experience that in the construction industry bargaining units often must comprise employees who work intermittently for the employer. See *Trammel Construction Co., Inc.*, 126 NLRB 1365, 1366. Here, unit employment undoubtedly dipped to a low level during certain periods of the 13-year bargaining history between AGC and the Union. The parties' contractual and bargaining relationships continued uninterrupted, however, as did the statutory obligations arising from them. The situation remained the same during the period of the 1965 negotiations to modify the existing contract: it was not altered by the fortuity that the employers needed only one unit employee during that period. Compare, *N.L.R.B. v. Local 542, International Union of Operating Engineers*, 331 F. 2d 99, 106-107 (C.A. 3), and cases cited therein.[9]

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[9] In *Local 542*, the court rejected the union's contention that because no operating engineers were working for the employer at the time of the recognitional picketing, the case fell outside the limitations of Section 8(b)(7). The court stated (331 F. 2d at 106):

> To hold that 'his employees' [as stated in the Act] refers merely to current employees would bring about an anomalous situation. [Footnote omitted] A union picketing for a recognitional purpose, where the employer currently employs workers in the particular craft of the union, would be subject to the requirement that a representational petition be filed within a reasonable period of time not to exceed thirty days. Yet, if there were no current employees and only a possibility of prospective employees,

(continued)

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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February 1968.

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9 (continued)

the Union's recognitional picketing would be unaffected by any requirement of filing a petition with the Board, if we accept the construction that the statute applies only to current employees. It then could picket, presumably, *ad infinitum.* Such a construction would be an unreasonable interpretation of the Act.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a); * * *

* * * * *

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of wh ich building and construction employees are members (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such

labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).

* * * * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief of restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with

respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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No. 22,337

IN THE

United States Court of Appeals For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BRICKLAYERS & MASONS INTERNATIONAL UNION,
LOCAL No. 3, and
FRANK S. LLEWELLYN, Secretary,
Respondents.

ON PETITION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

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METROPOLITAN PRESS SEATTLE, WASH.

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BRIEF FOR THE RESPONDENTS

ARGUMENT

I. This Case Involves a Single Issue of Law; Hence the Conclusion of the NLRB Is Not Binding Upon This Court

The Petitioner's (referred to as "the Board") brief correctly states that an impasse in bargaining occurred over the inclusion of Article VI, Section III of the Respondent's (referred to as "the Union") contract pro-

posal. That section merely provided an agreed-upon remedy in cases of violations of the subcontracting limitation set forth in Article VI, Section 1. While the Board concedes, at least implicitly, that a clause limiting or prohibiting subcontracting constitutes a mandatory subject of bargaining, the Board argues that an employer is not required to bargain over the matter of remedy in cases of violation of the agreement. Stated differently, the Board argues that "remedy" is permissive rather than a mandatory subject of bargaining.

There are no factual issues presented in this case. We are here concerned with a pure issue of law. It is well settled that "an administrative determination of questions of law is not binding upon a reviewing court." 2 Am. Jur. 2d, "Administrative Law," Sec. 676. Here, as in *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 321, 326 (1951), the court is faced with "an issue of law . . . which goes to the heart of the validity of the proceedings on which the order is based," and such issues are "open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." A Board order, like a building, must have a solid foundation, and the courts will not enforce orders of the Board which "rest on erroneous legal foundations." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). As will be demonstrated, the Board has in this case entered "in the substantive aspects of the bargaining process to an extent Congress has not countenanced." *NLRB v. Insurance Agents' International*, 361 U.S. 477, 498 (1960).

II. Inherent in the Acknowledged Substantive Right to Negotiate a Limitation Upon Subcontracting Is the Right to Negotiate With Respect to the Remedy in Instances of Violation of the Clause Limiting Subcontracting

At the outset it must be recognized that the everyday facts of industrial life are part and parcel of the legal concepts clustered around the duty of bargaining. In another, but related context, it has been observed that those who would restrict labor's right to effectively regulate subcontracting must of necessity shut their "eyes to the everyday elements of industrial strife." *Milkwagon Drivers Union v. Lake Valley Farm Products,* 311 U.S. 91, 94-96. Those who drafted the National Labor Relations Act did not suffer from the industrial myopia evidenced by the Board's order now before this court. The "term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.' *Order of R. Telegraphers v. Railway Express Agency,* 321 U.S. 342, 346 (1944)." *NLRB v. American Nat. Ins. Co.,* 343 U.S. 395, 408 (1952).

Turning then to a brief consideration of the facts of industrial life, we find increasing reliance by employers and arbitrators upon contract clauses reserving to the employer his "management rights." *NLRB v. American National Ins. Co.,* 343 U.S. 395, 409 (1952); *The Babcock & Wilcox Co.,* 45 LA 897[1]; *Capital Mfg. Co.,* 45 LA 1003. Similarly, time limitations for the filing of grievances are frequently negotiated and not infrequently enforced. *E.g., Northrop Northronics,* 43 LA 1114; *Krick-Tyndal*

1. "LA" refers to Labor Arbitration Service of the Bureau of National Affairs.

Company, 45 LA 257. Moreover, the facts of industrial life and the reported cases make it abundantly clear that employers and unions frequently specify in the labor agreement both the jurisdiction of the arbitrator and the type of relief which may be granted under the labor agreement. *Olin Mathieson Corp.,* 43 LA 623; *CWA v. New York Telephone Co.,* 42 LA 64; *In re Local* 1205, *Teamsters,* 42 LA 672.

The range of mandatory bargaining is indeed broad. We put to one side the obvious but interesting cases holding that the price of cafeteria meals, the rent for company housing and purchase of company stock constitute mandatory subjects of bargaining. Such cases—the Board would say—relate to employee benefits not union benefits and hence inapposite. But what then is to be said about the holding of this court that the subject of union security (i.e., a union shop clause) falls within the ambit of mandatory bargaining. *NLRB v. Jergens Co.,* 175 F.2d 130 (9th Cir. 1949). By the same token, what is to be said of the cases holding that the expiration date of the contract [*U. S. Pipe & Foundry Co. v. NLRB,* 298 F.2d 873 (5th Cir. 1962)], a no strike clause [*NLRB v. American Ins. Co.,* 343 U.S. 395, 408 (n. 22) (1952)] or matters involving the true interpretation of the contract [*NLRB v. Sands Mfg. Co.,* 306 U.S. 332, 342 (1939)] constitute mandatory subjects of bargaining? Reflection upon the problem at hand requires the conclusion that the Board in this case has failed to heed the admonition that the "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements." *NLRB v. American Nat. Ins. Co.,* 343 U.S. 395, 408-409 (1952).

The decisions which have just been reviewed provide the frame of reference within which this case should be adjudicated. We are concerned with the negotiation of a subcontracting clause. All will concede that a union has a right under federal law to negotiate a clause prohibiting or limiting subcontracting. The Act, itself, makes this clear. 29 U.S.C., Sec. 158(e). See also: *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), and *NLRB v. Retail Clerks Local* 648, 243 F.2d 777 (9th Cir. 1956). The right to negotiate over a given subject inherently includes the right to negotiate over the remedy in instances of violation. It is for this very reason that contracts commonly define or restrict the authority of arbitrators. Once it is conceded—and it must be conceded—that "the right is created," then it must be concluded that "the remedy exists." *Texas & N.O.R. Co. v. Brotherhood Ry. & S.S. Clerks*, 281 U.S. 548, 569-570 (1930).

One need not repair to the archives to obtain the citation to *Hadley v. Baxendale* in order to conclude that the breach of a subcontracting clause necessarily entails the loss of union dues and fees. Such damages are inherent in a breach of a subcontracting clause. Consider in this context the unanimous ruling of the Third Circuit sitting *en banc* that a union is entitled to recover lost dues incurred during the term of a contract where the employer breached the runaway shop clause of the contract. *Shoe Workers Local* 127 *v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3rd Cir. 1962). Closer to home, but in the same vein, is the holding of the Tenth Circuit that a union was entitled to lost dues revenue where a mining company entered into a putative, independent contractor arrangement with its union employees. *New Park Mining Co. v. Steel-*

workers Local 4264, 288 F.2d 225 (10th Cir. 1961).

Lest it be thought that the cases run only one way, it should be noted that a union which fines a member-supervisor in violation of the labor agreement will be required to disgorge its illegal gains. *Columbia Typographical Union No.* 101 *v. Evening Star Newspaper Co.*, 233 F.2d 697 (D.C. Cir. 1956). And a union which violates its obligation to provide workmen under the hiring hall clause of the contract can be held liable for the employer's consequential loss of business. *Plumbers & Steamfitters Local* 598 *v. Dillon,* 255 F.2d 820 (9th Cir. 1958).

This case involves the question of whether a union can negotiate a remedy reasonably and proximately related to the breach of a substantive provision which all concede to be a mandatory subject of bargaining. We are not here concerned with a performance bond; and, accordingly, the cases relied upon by the Board are wholly inapposite. If an employer violates the wage clause of a contract, the obvious and appropriate remedy is to require that employer to pay the difference between the contract scale and the amount in fact paid. In other words, the right to receive a negotiated scale necessarily implies a remedy whereby the employee is made whole. The right to receive a negotiated scale does not, inherently, assume a trust *res* or surety bond against which the injury can be redressed. A violation of a subcontracting clause, of necessity, results in a loss of union dues to the union. The Union, in this case, has asked only that the employer recognize the inevitable and proximately related consequence of a violation of the subcontracting clause.

All of us know that a union cannot enforce a sub

contracting clause by economic action. All of us know that such clauses may be enforced by invoking grievance and arbitration procedures or by proceeding in the federal courts. *Sheet Metal Workers v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). Procedural clauses reasonably related to the interpretation and application of a contract clause which addresses itself to a mandatory subject of bargaining have a "vitally important connection"[2] with the substance clause. Hence, such procedural clauses must be viewed as part and parcel of the substantive clause to which they relate. The Union had a right to negotiate a subcontracting clause. Such right necessarily contemplates a meaningful method of redress in instances of violation. Right and remedy cannot be separated.

2. *U.S. Pipe & Foundry Co. v. NLRB*, 298 F.2d 873 (5th Cir. 1962)—expiration date held to be a mandatory subject of bargaining.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's petition for enforcement should be denied.

DATED this 23rd day of April, 1968.

HUGH HAFER
THOMAS K. CASSIDY
Counsel for Respondents

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HUGH HAFER
Counsel for Respondents

NO. 22, 338

ited States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CONTINENTAL NUT COMPANY,

Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ited States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CONTINENTAL NUT COMPANY,

Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.),* for enforcement of its order (R. 57-59), [1] issued on May 10, 1967, against Continental Nut Company (hereafter called "Continental" or "the Company").

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* The relevant statutory provisions are set forth in an Appendix, *infra.*

[1] References designated "R" are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Board's decision and order are reported at 164 NLRB No. 72. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act, the record in the representation proceeding is part of the record before the Court pursuant to Section 9(d). This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at Chico, California, where the Company is engaged in the processing and sale of nuts.

I. The Board's Findings of Fact

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union [2] which had been certified by the Board, following a consent election, as bargaining agent for an appropriate unit of the Company's employees. [3]

Continental admits that it refused to bargain with the certified Union, but contends that the certification is invalid because the Board's Regional Director improperly found that the Union's promise to reduce initiation fees for all employees if it won the election, and its further statement that initiation fees had been reduced in the past when a large group of employees had joined the Union at the same time, did not constitute grounds for setting aside the Board election.

In the unfair labor practice proceeding, the Board refused to consider the merits of the Regional Director's conclusion on the ground that, under the consent election agreement, the Regional Director's findings are final and binding unless they

---

[2] Warehousemen's Union Local 17, International Longshoremen's and Warehousemen's Union.

[3] The unit certified was "all production and maintenance employee of the [Company] at its processing plant at Chico, California, including warehousemen, but excluding office clerical employees, salesmen, guards, and supervisors as defined in the Act."

are arbitrary or capricious, neither of which the Company alleged or offered to prove in the unfair labor practice proceeding. The facts are as follows:

A. The representation proceeding

On September 12, 1966, Continental and the Union executed, and the Regional Director approved, an Agreement for Consent Election in a unit of production and maintenance employees (R 53; 5-6). The consent election agreement provided, *inter alia,* that the Regional Director's determination of all questions relating to the election and the manner in which it was conducted "shall be final and binding" (R 54; 5-6). [4]

A representation election was conducted on October 28, 1966, after which the parties certified that the balloting was fairly conducted (R 53; 7). The tally of ballots showed that of 174 eligible voters, 90 ballots were cast for and 71 against the Union, with two challenged ballots (R. 7). On November 4, the Company filed timely objections to conduct allegedly affecting the results of the election and requested that the election be set aside (R 53; 8). Its only objection was that the Union had promised numerous employees that membership initiation fees would be waived if the Union were to win the election. Following a full investigation, the Regional Director issued his Report on Objections on December 1, 1966, in which he overruled the Company's objection (R 53, 54; 9-11). In his Report, the Regional Director found that the Union had told employees that the initiation fees for all employees would be reduced if the Union won the election. He further found that at two pre-election meetings the Union, in response to inquiries, told employees that initiation fees had been reduced in the past when a large group of employees had joined the Union at the same time. The Regional Director concluded that the

[4] The full text of the relevant provisions of the Consent Election Agreement is set forth *infra,* pp. 6-7.

foregoing promises were not objectionable because the employees understood that any reduction in the initiation fee would apply to all employees as a group and would not be contingent on how individual employees voted in the election. Accordingly, he overruled the Company's contentions and certified the Union *(ibid).* [5]

On December 19, 1966, the Union requested that Continental meet with it for the purpose of negotiating a collective bargaining agreement; but, by letter dated December 28, 1966, the latter refused to do so on the ground that it did not believe that the election reflected the free choice of its employees and that the certification was therefore invalid (R 53; 36-37).

B. The unfair labor practice proceeding

Pursuant to a charge filed by the Union (R. 12), the Regional Director issued a complaint on February 2, 1967, [6] alleging that Continental had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to bargain with the certified representative of its employees (R 52; 13-16). On February 13, the Company filed its answer denying the commission of the unfair labor practices alleged (R 52; 19-22). The General Counsel filed a motion for summary judgment with the Board on March 2, asserting that there were no issues of fact or law requiring a hearing in view of admissions contained in the Company's answer, and praying the issuance of a Decision and Order finding the violations as alleged in the Complaint (R 52-53; 30-35). On March 7, the Board issued an order transferring the proceeding to the Board and a notice to show cause why the General

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[5] The Company filed no exceptions to the Report on Objections and Certification of Representative.

[6] All dates hereafter refer to 1967 unless otherwise specified.

Counsel's motion for summary judgment should not be granted (R 53; 43). The Company's answer of March 23 defended the refusal to bargain on the ground that the Regional Director had erred in failing to sustain its objections to the election (R 53; 50-51).

The Board refused to pass upon the merits of the Regional Director's decision, noting that the Company had agreed to be bound by his findings and conclusions on objections to the election. In the absence of any allegation and proof that the Regional Director's determinations were arbitrary or capricious, the Board found that there were no issues of fact or law requiring a hearing and therefore granted the motion for summary judgment (R 54).

II. The Board's Conclusions and Order

The Board found that the Union's certification was valid and that Continental, having admittedly refused to honor the certification, had violated Section 8(a)(5) and (1) of the Act (R 56, 57).

The Board ordered Continental to cease and desist from refusing to bargain collectively with the Union and from interfering with, restraining or coercing its employees in the exercise of their Section 7 rights in any like or related manner. Affirmatively, the Board ordered Continental to bargain collectively with the Union upon request and to post appropriate notices (R 57-58).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT CONTINENTAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES

As the record shows, the Union was certified as the exclusive bargaining representative of Continental's production and maintenance employees as a result of a secret ballot election held

pursuant to the consent election agreement entered into by the parties. Despite requests by the Union to bargain, Continental has at no time honored the certification, taking the position that it was improperly issued and therefore invalid. We show below that the Company's attack on the Board's certification of the Union is without merit, and that its refusal to bargain was thus violative of Section 8(a)(5) and (1) of the Act.

This case "pivots on the agreement for consent election." *N.L.R.B. v. Parkhurst Manufacturing Co.*, 317 F. 2d 513, 516 (C.A. 8). The language of that agreement is explicit and unambiguous. It expressly provides, in relevant part, as follows (R. 5, emphasis supplied):

> 1. SECRET BALLOT . . . Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, *provided that the determinations of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election . . .*
>
> 6. OBJECTIONS, CHALLENGES, REPORTS THEREON - - Objections to the conduct of the election or conduct affecting the results of the election, or to a determination based on the results thereof, may be filed with the Regional Director within 5 days after the issuance of the Tally of Ballots . . . The Regional Director shall investigate the matters contained in the objections and issue a report thereon . . . *The method of investigation of objections and challenges, including the question whether a hearing*

> *should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.*

The law is well settled that where, as here, the parties to a consent election agreement provide that the Regional Director's determination on all election matters shall be "final and binding", the Regional Director's disposition of objections cannot be overturned in the absence of "a showing that they are arbitrary or capricious or not in conformity with National Labor Relations Board policies or the provisions of the Act." *N.L.R.B. v. Hood Corporation,* 346 F. 2d 1020, 1022-1023 (C.A. 9). Accord: *N.L.R.B. v. Cadillac Steel Products Corp.,* 355 F. 2d 191, 192 (C.A. 9); *N.L.R.B. v. Sumner Sand & Gravel Co.,* 293 F. 2d 754, 755 (C.A. 9); *N.L.R.B. v. Carlton Wood Products Co.,* 201 F. 2d 863, 867 (C.A. 9); *N.L.R.B. v. Parkhurst Manufacturing Co., supra; Manning, Maxwell & Moore, Inc. v. N.L.R.B.,* 324 F. 2d 857, 858 (C.A. 5); *N.L.R.B. v. Jas. H. Matthews & Co.,* 342 F. 2d 129, 131-132 (C.A. 3), cert. denied, 382 U.S. 832.[7] The Company urges that the Board's (*i.e.,* the Regional Director's) conclusions with respect to the objections were erroneous. Even assuming that this allegation of error could be sustained, it is settled law that "to prove arbitrary or capricious action on the part of the Regional Director, more than error or

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[7] The purpose of "plac [ing] a restrictive limitation upon [a court's] power to review" the Regional Director's disposition of such objections [*N.L.R.B. v. J.W. Rex Co.,* 243 F. 2d 356, 358 (C.A. 3)] is to provide for the prompt and final settlement of disputes concerning the conduct of representation elections and thus to avoid or reduce delay, which is likewise the policy underlying consent election agreements. See, e.g., *Semi-Steel Casting Co. v. N.L.R.B.,* 160 F. 2d 388, 391 (C.A. 8), cert. denied, 332 U.S. 758; *N.L.R.B. v. Capitol Greyhound Lines,* 140 F. 2d 754, 758 (C.A. 6), cert. denied, 322 U.S. 763.

honest mistake must be demonstrated." *N.L.R.B. v. Hood Corporation, supra.* Accord: *N.L.R.B. v. J.W. Rex Co., supra; Elm City Broadcasting Corp., v. N.L.R.B.,* 228 F. 2d 483, 486 (C.A. 2); *N.L.R.B. v. Volney Felt Mills,* 210 F. 2d 559, 560 (C.A. 6).

The Company contends, however, that the consent election agreement only entitles the Regional Director to make final and binding determinations as to any question of fact or procedure, but not as to matters involving legal interpretation. That contention is without merit. First, the express language of the agreement provides that "the determination of the Regional Director shall be final and binding upon *any question . . . relating in any manner to the election . . .*" Clearly, the effect upon the employees of the Union's offer to reduce initiation fees directly relates to whether a free election has been held, which in turn relates "in any manner to the election." The courts have so held in virtually identical cases where the election results have been challenged on the basis of allegedly false and misleading union statements. *N.L.R.B. v. Jas. H. Matthews & Co., supra; N.L.R.B. v. General Armature & Mfg. Co.,* 192 F. 2d 316 (C.A. 3), cert. denied, 343 U.S. 957. Second, the Company's reliance upon this Court's statement in *N.L.R.B. v. Hood Corporation,* (346 F. 2d 1020, 1022) that the Regional Director may make final and binding determinations on "procedural and substantive" questions is misplaced. The Company interprets "substantive" to mean "factual" rather than "legal" questions, and asserts that this means that the Regional Director may not make binding determinations of law. However, its is clear that "substantive" as opposed to "procedural" questions encompass both fact and law. Thus, *Black's Law Dictionary,* Fourth Edition, pp. 1367-1368, defines "procedure" as "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right . . . This term is commonly opposed to the sum of legal principles constituting the substance of the law . . ." See,

for example, *Manning Maxwell & Moore, Inc. v. N.L.R.B., supra,* where the Regional Director's determination that certain conduct did not, as a matter of law, create an atmosphere of fear and reprisal such as to render a free election impossible, was upheld by the Fifth Circuit. The Regional Director had made the ruling pursuant to a consent election agreement similar to the one here, and the Court gave effect to that agreement: " . . .where a consent agreement to an election makes the determination of the Regional Director final and binding, such a determination is conclusive unless he acts arbitrarily or capriciously, or out of line with Board policy or the Act's requirement; and assertions of mere error are not sufficient" (324 F. 2d at 858).

Moreover, even an allegation of error cannot be sustained, for the Regional Director's conclusions were in harmony with established Board policy and with judicial precedent. As noted above, the Regional Director found that the Union told employees that the initiation fees for *all* employees would be reduced if it won the forthcoming election, and that initiation fees had been reduced in the past when a large group of employees joined the Union at the same time. He also found that the employees understood that any reduction of the initiation fee would apply to all employees as a group and would not be contingent on how individual employees voted in the election. The Board has held, as the Regional Director did here, that the foregoing circumstances do not constitute an interference with a free election and thus do not warrant setting an election aside. *Weyerhaeuser Co.,* 146 NLRB 1, 5; *Gilmore Industries, Inc.,* 140 NLRB 100, reaffirmed 142 NLRB 781. [8] The courts have reached the same conclusion. Thus,

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[8] Under Board law as it existed at the time the election in this case was conducted (October 1966), a pre-election offer of a waiver of initiation fees would be invalid only if it were made contingent upon how the employees voted in the election, *Lobue Bros.,* 109 NLRB 1182, 1183;

(footnote cont'd page 10)

in *Macomb Pottery Co. v. N.L.R.B.*, 376 F. 2d 450, 455, the Seventh Circuit rejected an employer's contention that the election was invalidated because the waiver of fees was to apply only "when the contract is signed" and was thus conditioned upon the union's winning the election. The Court said, in part:

> [W]e agree with the Board that the important consideration is that the promise was not conditioned on the vote or support of the individual employee. If the union won and a 'contract is signed,' the employee who voted against the union would have the same benefit (i.e., waiver of fee) as the employee who voted for the union.

Similarly, in *N.L.R.B. v. Gorbea, Perez & Morell, S. en C.*, 328 F. 2d 679, 682, the First Circuit

> . . . fully agree[d] with the Board that a pre-election promise permitting all present employees, whether they vote[d] for the union or not, to join without payment of an initiation fee up to and *within a reasonable time immediately after*

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8 (Cont'd from preceding page)
and see the *Weyerhaeuser and Gilmore Industries* cases, *supra*. In April 1967, the Board overruled *Lobue Bros.* and held that waivers of initiation fees, whether contingent upon the results of the election or not, would no longer constitute a basis for setting aside an election. *Dit-MCO, Inc.*, 163 NLRB No. 147, 64 LRRM 1476, 1477-1478. This case was decided, however, under *Lobue Bros.*, as reflected in the accompanying text.

> *the election* would not be an [unlawful] inducement. *Gilmore Industries, Inc.*, 140 NLRB 100. (Emphasis added). [9]

See also, *Amalgamated Clothing Workers of America v. N.L.R.B.*, 345 F. 2d 264, 268 (C.A. 2) [no impropriety in a waiver of fees for all who joined the union before a contract was signed].[10] Based upon the foregoing, we contend that the Regional Director's decision was correct.

However, as previously demonstrated, the propriety of the Regional Director's decision is not in issue before this Court. If his conclusion was not "arbitrary or capricious", the Company cannot prevail here. The foregoing discussion of the law manifestly indicates that, judged by the foregoing standard, the Regional Director's refusal to set aside the election, even if erroneous, should not be disturbed.

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[9] What the Court in *Gorbea* found objectionable was the union's positive misrepresentation that the "regular" initiation fee would be waived for those joining right away, although the union did not levy a "regular" initiation fee at all. Such conduct was not involved in the instant case.

[10] Although the Sixth Circuit apparently has held otherwise, *N.L.R.B. v. Gilmore Industries, Inc.*, 341 F. 2d 240, we submit that the weight of authority and reason favor the Board's position.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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January 1968

National Labor Relations Board.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * *

REPRESENTATIVES AND ELECTIONS

* * * * * * *

[Sec. 9] (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * * *

[Sec. 10] (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure

or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * * *

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No. 22,338

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CONTINENTAL NUT COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE RESPONDENT

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CONTINENTAL NUT COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE RESPONDENT

JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board[1] for enforcement of its Order against Continental Nut Company[2] issued on May 10, 1967. (R. 57.) The Board's Decision and Order is reported at 164 NLRB No. 72. In its Answer, Respondent has denied the commission of any unfair labor practices, and has requested that the Court deny enforcement of the Board's Order. (R. 62.) The Court has jurisdiction of this proceeding under Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), the events in this case having occurred in Chico, California.

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[1]Hereinafter called the "Board".

[2]Hereinafter called "Respondent" or "Company".

COUNTER STATEMENT OF THE CASE

A. Questions Presented to the Court.

(1) It is the Respondent's position that the rule applicable in this Court with respect to the construction and effect of the Consent-Election Agreement[3] requires that the Regional Director's determinations as to questions of fact or procedure be upheld unless they are shown to be arbitrary or capricious, but that his legal conclusions or determinations are subject to review without regard to the arbitrary or capricious standard.

(2) It is the Respondent's further position that the Regional Director applied a legal standard which was contrary to the provisions of the National Labor Relations Act[4] and that, as a result of this legal interpretation, no factual investigation was made upon which the Regional Director could base determinations as to the most significant element in the case, i.e., the impact upon the employees' freedom of choice of the Union conduct challenged by the Company.

(3) It is Respondent's further position that the proper construction of the provisions of the Act relating to the effect of the Union's conduct is that set forth in *NLRB v. Gilmore Industries, Inc.,* 341 F.2d 240 (6th Cir., 1965) *infra,* which decision should be followed by this Court.

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[3]Hereinafter called "Agreement".

[4]Hereinafter called the "Act".

B. Supplemental Factual Statement.

Respondent does not desire to controvert the statement of facts presented by the Board in its opening Brief. However, in view of the issues presented in this case, there are some factual omissions in the statement which should be called to the Court's attention.

(1) The Regional Director's Investigation of the Facts.

The Regional Director's Report on Objections and Certification of Representative[5] makes clear that his factual investigation with respect to the Company's objections was limited to ascertaining the content of the Union's promise concerning the reduction of initiation fees and the conditions attached to that promise. (R. 9, 10.) The Regional Director did not investigate whether, in fact, the Union's conduct impaired the employees' freedom of choice in the election. Rather, the Regional Director concluded that, based upon the Board's decision in *Weyerhaeuser Company,* 146 NLRB 1, *infra,* there was no impairment of the employees' freedom of choice as a result of the Union's conduct *as a matter of law,* and, hence, it was unnecessary for him to investigate whether, *as a matter of fact,* the Union's conduct impaired the employees' freedom of choice

(2) The Regional Director's Findings and Conclusions.

The Regional Director's Report contains *no finding of fact* with respect to whether the conduct of the Union in this case impaired the employees' freedom

[5]Hereinafter called the "Report".

of choice. The Regional Director apparently concluded that the Board's decision in *Weyerhaeuser Company, supra,* which purported to rule that union conduct of the sort there present did not, *as a matter of law,* impair the employees' freedom of choice, obviated the necessity of findings as to the effect of the challenged conduct upon the employees.

ARGUMENT

I. THE REGIONAL DIRECTOR'S FAILURE TO INVESTIGATE ALL OF THE RELEVANT FACTS WAS ARBITRARY AND CAPRICIOUS.

The Regional Director did not conduct an investigation as to the effect or impact of the Union's conduct upon the employees. The failure to conduct an investigation on the most significant and crucial aspect of the Company's objections violated the Agreement and was arbitrary and capricious. This fact alone is sufficient to preclude enforcement of the Board's Order.

The Agreement provides, in relevant part, as follows:

> "6. OBJECTIONS, CHALLENGES, REPORTS THEREON.— . . . The Regional Director *shall investigate* the matters contained in the objections and issue a report thereon. . . . The *method of investigation* of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be *final and binding.*" (R. 5.) (Emphasis supplied.)

The Regional Director patently failed to comply with the foregoing provision of the Agreement in that, notwithstanding the mandate of the Agreement that he *shall investigate* the matters contained in the objections, he actually investigate only the facts relevant to a *portion* of the objections and failed to investigate the facts relating to the actual thrust of the objections, i.e., the impact upon the employees.[6] The thrust of the Respondent's objections to the Union's conduct was the *effect* that the conduct had on the employees; yet the Regional Director's investigation stopped *prior* to reaching that question.

The Courts have considered the type and adequacy of investigation as being extremely significant when determinations pursuant to Agreements have been challenged. See *NLRB v. Carlton Wood Products Co.*, 201 F.2d 863, 867 (9th Cir., 1953) where the Court stated:

> "A decision to proceed by *ex parte* investigation rather than formal hearing might in a given case be arbitrary and capricious, but not where, as here, there is dispute only as to the conclusions to be drawn from undisputed basic facts."

Needless to say, this comment is especially relevant to this case because the crucial basic fact, i.e., the impact on the employees, is very much in dispute, and

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[6]As the emphasized language makes clear, the Regional Director is given authority to make a final decision as to the method of investigation of objections, but is not given authority to determine whether to conduct an investigation. In this case our argument goes not to the method of investigation, but to the fact that no investigation was conducted with respect to the most crucial fact involved in the case.

no factual determination has been made concerning the disputed fact. See, also, *NLRB v. Jas. H. Matthews & Co.*, etc., 342 F.2d 129, 130 (3d Cir., 1965), where the Court went out of its way to point out that:

> "There is no dispute as to the material facts. . . . The Respondent does not here question the adequacy of the investigation. . . . After the investigation had been concluded the Regional Director . . . prepared and served upon the parties a comprehensive report . . . "

In the instant case the Company's argument goes to the absence of an investigation as to the determinative facts in the case. Neither the Regional Director nor the Board made an investigation or determination regarding the impact of the Union's promise of benefit upon the employees. This failure can only be characterized as arbitrary and capricious.

II. THE ARBITRARY AND CAPRICIOUS STANDARD APPLIES ONLY TO QUESTIONS OF FACT OR PROCEDURE AND NOT TO LEGAL INTERPRETATIONS.

This Court has previously formulated the rule to be applied with respect to the effect of a consent-election agreement:

> "It is well settled that where a consent agreement is entered into providing that the determinations of the Regional Director on any question shall be final and binding, the procedural and substantive determinations thereafter made by the Regional Director can be successfully chal-

> lenged only on a showing that they are arbitrary or capricious or not in conformity with National Labor Relations Board policies or the provisions of the Act." *NLRB v. Hood Corp.,* 346 F.2d 1020, 1022 (9th Cir., 1965).

The Board appears to argue (Brief of Board, pp. 8-9) that the arbitrary or capricious standard is applicable equally to questions of fact, procedure, and law. If such were the rule, the language following the words "arbitrary or capricious" in the *Hood* case would be completely superfluous because the rule, as asserted by the Board, would be complete with the statement that determinations made by the Regional Director can be challenged only by showing that they are arbitrary or capricious. Courts seldom formulate a rule, such as that set forth in *Hood,* without giving meticulous care to the language used. If this Court in *Hood* had intended the arbitrary or capricious standard to be applicable to *all* determinations made pursuant to a consent-election agreement it simply would not have added the alternative standards dealing with "Board policies" or "the provisions of the Act". We submit that the rule as formulated makes clear that the arbitrary or capricious standard is only one of three appropriate standards. The other standards implicit in the *Hood* case apply to determinations not in conformity with Board policies or determinations not in conformity with the provisions of the Act. The language carefully chosen by the Court is completely inconsistent with the position here asserted by the Board.

There is sound reason behind the distinction carefully drawn by the Court in *Hood*. First, the arbitrary and capricious standard is singularly well suited to final resolution of disputed questions of fact and procedure. The Regional Director, or his representatives, are in a position to ascertain promptly and with first-hand knowledge the facts that are deemed relevant to the resolution of the factual issues that may be presented, and to select the appropriate procedures. When the parties have agreed that the Regional Director's determination as to such factual and procedural issues shall be final, the "arbitrary and capricious" standard is appropriate for Board or judicial review. However, the arbitrary and capricious standard is patently unsuited to the resolution of legal questions. A legal determination is either correct or not correct. There is simply no degree of "in between" where a Court may conclude that an inferior tribunal's interpretation of the law is erroneous but should nevertheless be affirmed because a reasonable man could think such was the law. The fact that reasonable men differ as to the proper construction of the law is attested by the number of dissents written in almost all controversial cases faced by the courts. Yet, while many statutes and judicial decisions have formulated the appellate policy that discretionary policy determinations or resolutions of factual or procedural issues by an inferior court or tribunal will be affirmed on appeal if supported by substantial *evidence,* we are unaware of any instance in which a higher court has been obliged to affirm a

legal interpretation of an inferior court or tribunal with which the superior court disagrees.

As we understand the Board's position, this Court is being told that it must affirm the Regional Director's legal interpretations even if the Court decides that the Regional Director made an erroneous legal determination. We do not read this Court's decision in the *Hood* case to require such a result and respectfully request that this Court make clear that no such effect flows from the execution of consent-election agreements.[7]

III. THE REGIONAL DIRECTOR'S CONCLUSIONS CHALLENGED IN THIS CASE ARE NOT FINAL UNDER THE TERMS OF THE CONSENT-ELECTION AGREEMENT AND THE BOARD'S RULES AND REGULATIONS.

The language in the Agreement providing that the determination of the Regional Director shall be final and binding upon any "question . . . relating in any manner to the election . . ." is in paragraph 1 of the Agreement, which is headed "Secret Ballot", and which provides that the election shall be held in accordance with the Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board. (R. 5.) In other words, it is questions as

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[7]If the Board's position is affirmed on this point, it is not unreasonable to suppose that practitioners will adopt a policy of refusing to allow their clients to execute such Agreements because in future cases a Regional Director could disregard the law as established by the Board if any Circuit had differed with the Board on the point at issue, or could disregard a prior decision of the Circuit having jurisdiction over the Regional Director, provided the Board or another Circuit agreed with the Regional Director's legal interpretation.

to whether the election procedures were in accordance with the Board's Rules, Regulations, and policies[8] that are "final" pursuant to the language here relied upon by the Board.

Paragraph 6 of the Agreement, which is headed "Objections, Challenges, Reports Thereon", makes a distinction between objections to the procedural conduct of the election, which is the only type of objections contemplated in paragraph 1 of the Agreement, and objections to "conduct affecting the results of the election".[9] At no place in the Agreement is it provided that the Regional Director's determination shall be final as to questions concerning *conduct affecting the results* of the election.

It may be argued by the Board that in calling attention to this omission in drafting, the Respondent is merely asserting a defense based on a legal technicality. If such an argument be made, we rejoin that the Agreement was drafted by the Board or its representatives and any ambiguity should properly be construed against the Board. But of greater significance, the limited scope of the provision granting finality to the Regional Director's determinations is consistent with the Board's Rules and Regulations authorizing consent-election agreements.

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[8]As we demonstrate in Argument, *infra*, the Board cannot adopt a "policy" which deprives employees of the protection afforded by the Act.

[9]That paragraph reads, in relevant part, as follows:

"6. OBJECTIONS, CHALLENGES, REPORTS THEREON.—Objections to the conduct of the election *or* conduct *affecting the results* of the election, . . ." (R. 5) (emphasis supplied)

Section 102.62(a) of the Board's Rules and Regulations (29 CFR Part 102) provides in relevant part, that the parties may:

> ". . . enter into a consent-election agreement leading to a determination by the regional director of the *facts* ascertained after such consent election. . . . The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 except that the *rulings* and *determinations* by the regional director *of the results thereof shall be final,* and the regional director shall issue to the parties a *certification* . . . with the same force and effect *as if issued by the Board,* . . ." (Emphasis supplied.)

It should require no argument that the Agreement must be construed together with the Rules and Regulations authorizing its execution in order to determine the proper construction, and the force and effect of the Agreement. Those Rules and Regulations specify that the *facts* shall be determined by the Regional Director.[10] The only matters which the Rules and Regulations expressly provide to be "final" are the rulings and determinations by the Regional Director of the *results* of the election, i.e., the tally of ballots. Finally, the Rules and Regulations provide that the *certification,* which is the only matter challenged in this case, shall have the same force and effect *as if issued by the Board.*

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[10]It seems clear that the Regional Director also violated this mandate. He did not determine, as a fact, the impact of the Union's conduct on the employees.

If the certification of the Regional Director is given the same force and effect as if issued by the Board, the legal interpretations and conclusions embodied in that certification are subject to review by this Court.[11] Accordingly, legal interpretations and conclusions are in no way affected by the fact that the certification was actually that of the Regional Director pursuant to the Agreement rather than a certification of the Board itself.

IV. AN EMPLOYER MAY NOT, BY AGREEMENT OR OTHERWISE, WAIVE RIGHTS GUARANTEED EMPLOYEES BY CONGRESS.

Section 7 of the Act guarantees employees the right to self-organization. In order to preserve and implement the free exercise of this right, the Board and the Courts have consistently held that coercive acts, threats, or economic inducements may interfere with or preclude the proper exercise of the rights guaranteed by Congress. Where conduct is found to have interfered with the free exercise of such employee rights, a new election will be directed in order that the employees can express their desire in a free and untainted atmosphere.[12]

Whether particular conduct constitutes an impairment of employee rights must be initially decided by the Board or, in proper cases, by the Regional Di-

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[11]Courts must set aside Board decisions which rest on an "erroneous legal foundation". *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-113.

[12]The Board has used the phrase "laboratory conditions" to describe the atmosphere required for free elections. See, e.g., *Dal-Tex Optical Company Inc.*, 137 NLRB 1782, 1786-7.

rector. Where the Board has properly delegated certain matters to the Regional Director for decision, that decision is nevertheless encompassed within a Board order and that order is then subject to judicial review by a Court of Appeals. In reviewing decisions and orders of the Board, the Court of Appeals is empowered to enforce, modify or set aside the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. §10(e) of the Act. In *NLRB v. Brown,* 380 US 278, 291-92, the Court stated:

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such *review is always properly within the judicial province,* and courts would abdicate their responsibility if they did not fully review such administrative decisions." (Emphasis supplied.)

It seems clear that the Board's position in this case as to the limitations upon judicial review flowing from the execution of the Agreement is entirely inconsistent with the scope of judicial review established by Congress. Moreover, although it may be argued by the Board that an employer may, by private agreement, waive or modify its own statutory right to judicial review, it seems clear that an employer may not, by private agreement or otherwise, waive or modify the employees' statutory right to judicial review. Nor can the employees' right to judicial review be abro-

gated because it is the employer, rather than the employees, which pursues and seeks to have vindicated the employees' right to self-organization free of unlawful impairment. Cf. *International U. of E., R. & M. Wkrs., Local 613 v. N.L.R.B.*, 328 F.2d 723, 726; *Safeway Stores, Inc.*, 148 NLRB 660, 662.

V. THE AUTHORITIES RELIED UPON BY THE BOARD DO NOT SUPPORT ITS POSITION AS TO THE EFFECT OF A CONSENT-ELECTION AGREEMENT.

The Board seems to argue that two cases which are said to be "virtually identical" to the instant case support its position that the Agreement authorizes the Regional Director to make final and binding decisions "involving legal interpretations". (Brief, p. 8.) Respondent submits that the cases relied upon do not support the Board's position.

NLRB v. Jas. H. Matthews & Co., etc., 342 F.2d 129 (3d Cir., 1965), is clearly distinguishable from this case on several grounds. First, the Court there noted:

> "The Respondent does not here question the adequacy of the investigation." (342 F.2d 130.)

In the instant case, the adequacy of the investigation is at issue in view of the Regional Director's failure to investigate the most crucial issue presented by the Respondent's objections, i.e., the effect of promises of benefits upon the employees. Secondly, the Regional Director in the *Matthews* case did investigate and make specific factual findings as to the impact of the challenged conduct upon the employees. Specifically, the Regional Director there:

> ". . . found that a majority of the employees . . . had sufficient knowledge and information to enable them to evaluate the allegedly misleading statements." (342 F.2d 130.)

The Regional Director in *Matthews* also found that the company was afforded ample time to refute the allegedly false statements and concluded that under the facts and circumstances the results of the election were not adversely affected by the challenged conduct. The Court summarized the investigation and report of the Regional Director as follows:

> "It appears from the report of the Regional Director that the representation certification was based upon a thoughtful consideration of the evidence as a whole and a discriminating evaluation of the possible impact of the misleading statements on the fairness of the election." (342 F.2d 132.)

As the foregoing quote makes clear, the conduct of the Regional Director in *Matthews* is not even remotely similar, let alone virtually identical, to the conduct of the Regional Director in this case. It is the failure of the Regional Director to make "a discriminating evaluation", or any evaluation, of the possible impact of the Union's conduct on the employees that is the basis for the Company's position in this case. Where the Regional Director in *Matthews* investigated and made factual findings as to the possible impact on the employees of the challenged conduct, the Regional Director in this case made no such investigation and made no such factual findings. The Regional Director merely stated his legal inter-

pretation that the Board's *Weyerhaeuser* decision rendered such an investigation and factual findings unnecessary to the resolution of the Company's objections. (R. 10.)

The second case stated by the Board to be "virtually identical" to this case is *NLRB v. General Armature & Mfg. Co.*, 192 F.2d 316 (3d Cir., 1951). In that case the thrust of the employer's argument was that the Regional Director's representative had not made a "reasonable investigation of the alleged misconduct of the union" (192 F.2d 317), although it was undisputed that an investigation was conducted. The employer there sought to establish an arbitrary or capricious failure to conduct a reasonable investigation but, in the opinion of the Court, failed to do so. In the instant case the dispute is not as to the adequacy of the investigation of the Union's conduct. Rather, it is the Respondent's position that the Regional Director acted arbitrarily and capriciously in that *no investigation was conducted* as to the possible effect of the Union's conduct on the employees.[16]

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[16]Although the Respondent takes the position that this failure to conduct an investigation as to the possible effect of the Union's conduct constitutes a violation of the Agreement wherein it is provided that the Regional Director "shall investigate" the objections (R. 5), the failure to investigate on the part of the Regional Director is a corollary to his legal interpretation as to the effect of the Board's *Weyerhaeuser* decision. Accordingly, regardless of whether this case is viewed as a challenge to the Regional Director's failure to conduct *any* investigation as to the possible effect on the employees of the Union's conduct, or as a challenge to the authority of the Board to determine that, as a matter of law, the Union's conduct did not constitute an impairment of the employees' freedom of choice, neither of the cases relied upon by the Board is determinative of the question before this Court, and neither of these cases precludes the Court from reviewing the questions presented by the Company.

The Board appears to argue that the decision of the Fifth Circuit in *Manning, Maxwell & Moore, Inc. v. NLRB,* 324 F.2d 857 (5th Cir., 1963) supports the Board's position that the Agreement encompasses *legal* determinations of the Regional Director within the "arbitrary and capricious" standard. (Brief, p. 9.)

The opinion in *Manning, Maxwell & Moore* does not support the construction placed upon it by the Board. In that case a union won the election with 203 ballots being cast for the union and 177 ballots being cast against the union. The investigation conducted as a result of the company's objections determined that three anonymous, threatening telephone calls had been made and that one employee had been personally threatened by another employee to vote for the union. The Regional Director ruled that three isolated telephone calls and the one threat made to an employee did not create an atmosphere of fear or reprisal such as to render a free expression of choice impossible.

The Court approved the Regional Director's determination. In so doing, the Court made the following statement:

> "It was the duty of the Director to determine whether the conduct reasonably tended to interfere with the voters' free choice so that the uncoerced desires of the employees could not be expressed in the election. . . . Where there was no proof that the conduct was attributable to the union and where the number of voters threatened was insufficient to affect the outcome of the election, it can hardly be said that the Director acted

arbitrarily in upholding the election." (324 F.2d 858.)

As the above-quoted language makes clear, the *Manning, Maxwell & Moore* case is, in fact, supportive of the position of the Respondent in this case. The Respondent here urges that it was the duty of the Regional Director to determine whether the Union's conduct reasonably tended to interfere with the employees' free choice, and that the Regional Director acted arbitrarily when he failed to perform that duty.

VI. THE LEGAL QUESTION HERE PRESENTED ON THE MERITS WAS CORRECTLY RESOLVED BY THE COURT IN THE GILMORE INDUSTRIES CASE AND THAT CASE SHOULD BE FOLLOWED BY THIS COURT.

The relevant legal considerations which determine whether the Union's conduct was objectionable under the Act are well articulated by the Court of Appeals in *NLRB v. Gilmore Industries, Inc.*, 341 F.2d 240 (6th Cir., 1965). The Court there stated:

> ". . . the paramount purpose of the Act was to secure to the employees freedom of choice in the selection of their representatives. . . . *There can be no question but that freedom of choice may be seriously interfered with by economic inducements.*" (341 F. 2d 241.) (Emphasis supplied.)

The Court in *Gilmore* subsequently analyzed the decision in *NLRB v. Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679 (1st Cir., 1964) which is relied upon

by the Board. (Brief, p. 10.) The Court in *Gilmore* quoted the following language from the *Gorbea* opinion:

> " 'The question whether there is interference with the employees' freedom of choice is often subtle and difficult. However, we start with one simplifying principle, avoiding the necessity of making the often impossible determination of its actual impact in the particular instance, that an inducement normally is material if objectively it is likely to have an appreciable effect.' " (341 F.2d 241-242.)

Based upon the foregoing statements of legal principles, which are presumably not disputed by the Board in this case, the Court in *Gilmore* described the judicial function in relation to the question presented in the following language:

> "In determining whether there was an interference with the employees' freedom of choice, we cannot detach the waiver of initiation fees from the circumstances under which it was made. We must consider all of the relevant facts and circumstances of the case." (341 F.2d 242.)

As a result of its analysis in relation to the facts and circumstances of that case, the Court in *Gilmore* concluded:

> ". . . that the economic inducement offered by the union was material and impeded a reasoned choice." (341 F.2d 242.)

The Respondent does not contend that this Court should, or based on this record can, reach the same evidentiary conclusion as was reached by the Court

in *Gilmore.* The Respondent's position is simply that the Regional Director was required, in the language of the Court in *Gilmore,* to "consider all of the relevant facts and circumstances of the case" and then to make findings of fact or conclusions as to the possible effect on the employees of the economic inducement offered by the Union.

The Board apparently construes *Gilmore* as being contrary to certain cases cited by the Board where conduct similar to that engaged in by the Union in this case was also challenged. (Brief, pp. 10-11, footnote 10.) We do not believe that the holding or reasoning of *Gilmore* is inconsistent with those cases. *Macomb Pottery Company v. NLRB,* 376 F.2d 450 (7th Cir., 1967) and *Amalgamated Clothing Workers of America v. NLRB,* 345 F.2d 264 (2d Cir., 1965) found that the Board's orders were supported by substantial evidence on the record considered as a whole, while the Court in *Gilmore,* although phrasing its decision in different language, presumably found that the Board's order was not supported by such evidence.[14]

The Respondent submits that this case is controlled by *Gilmore,* rather than *Macomb Pottery* and *Amalgamated,* because there is *no* factual evidence in this record as to the crucial issue under the Act, namely, the impact upon the employees of the Union's conduct.

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[14]Cf. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488: "Congress has . . . made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, . . ."

When the reasoning of the Court in *Gilmore,* which we believe sets forth a proper statement of the law, is compared with the reasoning of the Regional Director in the instant case, it seems obvious that the Regional Director placed the cart before the horse. The Court in *Gilmore* held that the crucial determination—whether there was a possible interference with the employees' freedom of choice—was a legal determination based upon all of the relevant facts and circumstances in the case. Here the Regional Director did not attempt to ascertain the facts concerning the impact of such promises on the employees. The Regional Director apparently determined that the Board's decision in *Weyerhaeuser* dictated a conclusion that, as a matter of law, there was no impairment of the employees' freedom of choice, and that it was unnecessary for him to consider all of the relevant facts and circumstances of the case.[15] In the words of the Regional Director, the Union's:

> ". . . conduct [does not] impair the employees' freedom of choice (*Weyerhaeuser Company,* 146 NLRB 1). On the basis of the foregoing and the entire investigation, the undersigned concludes and finds that the employer's objections *do not raise substantial or material issues. . . .*" (R. 10.) (Emphasis supplied.)

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[15]The Board may assert that it is empowered to resolve the conflicting interests of union organization versus employee rights as a policy question. Any such argument implicitly admits that its decision is subject to judicial review. See *NLRB v. Brown, supra,* 380 U.S. at 391-2; *American Ship Building Co. v. Labor Board,* 380 U.S. 300, 318.

The Board seems to argue that the decision of the First Circuit in *Gorbea, supra,* supports its position in this case. (Brief, p. 10.) We submit that both the analysis and decision in *Gorbea* support the Respondent's position.

First of all, it should be noted that the language from *Gorbea* quoted in the Board's brief (pp. 10-11) is pure dictum. The Court's decision in *Gorbea* concluded that *under the facts there present* the purported waiver of initiation fees was a substantial organizational inducement and the Court refused to enforce the Board's order.

Of greater significance to this Court is the fact that the Court in *Gorbea* alluded to several material considerations which should properly have been considered by the Regional Director in reaching a conclusion as to the possible effect on the employees of the offer of waiver. For example, the Court noted that:

> ". . . since a penny saved is a penny earned we have difficulty in seeing why a $10 bribe to join the union is septic, . . . while a promise to waive a 'regular' $25 initiation fee is benign because there is a contingency." (328 F.2d 681.)

The Court also noted that:

> "We think the better expert on what persuasion is needed by persons sought to be induced is the knowledgeable party who offers [an] . . . inducement." (328 F.2d 682.)

In a footnote the Court in *Gorbea,* after noting that the initiation fee was $25 and that the employees' weekly earnings were $18 to $20, noted:

"To such individuals $25 would seem what may be called serious money." (328 F.2d 682, footnote 5.)[16]

In short, *Gorbea* is, read in its entirety, more consistent with the position of the Respondent than of the Board.

The Board's reliance on *Amalgamated Clothing Workers of America v. NLRB,* 345 F.2d 264 (2d Cir., 1965) is completely misplaced. The Second Circuit there adopted the same analytical process followed by the Sixth Circuit in the *Gilmore* case. The Court stated:

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[16]It seems self-evident that the Union thought the waiver or reduction of its initiation fee would have some advantage to the Union in the election or else it would not have thrown away money it might have otherwise collected. If the Union, the party closest to the employees, felt that the waiver would have an appreciable effect on the employees' choice, it seems inescapable that the Regional Director, the Board, and the Court must consider the possibility that the offer of waiver would have an effect on the employees. Whether the effect would be substantial or *de minimis* must, as the Court in *Gilmore* indicated, depend upon the facts of the particular case, including the amount of the fee, the employees' earnings, the educational level of the employees, and other factors. It seems clear, for example, that the Regional Director or Board could properly conclude that the waiver of a $5.00 initiation fee would have a *de minimus* effect on highly educated employees earning $200 a week. Conversely, it seems clear that waiver of an initiation fee of $500 could have a substantial effect on employees earning $50 a week. The Board apparently takes the position that both cases *must* be treated the same. We submit that a court called upon to enforce the Board's order in the hypothetical case discussed above involving a $5 initiation fee could very well find substantial support in the record and enforce the Board's order, while a court in the case involving the $500 initiation fee could very well find that the Board's order lacks substantial support in the record and refuse to enforce the order. The important and necessary ingredient is an investigation on which to base findings of fact, which in this case the Regional Director failed to accomplish.

> "The question remains whether the inducement [offer of waiver] was proper or improper. (citing *Gorbea.*) We must consider, among other things, what justification there may have been for the waiver and the extent to which it foreclosed a rational decision on the part of the employees. (again citing *Gorbea.*)" (345 F.2d 268.)

If it was necessary for the Court to consider whether the waiver foreclosed a rational decision by the employees, it seems inescapable that it was also necessary for the Regional Director in this case to consider that question. His failure to do so results in the absence from this record of a finding by the Regional Director on the single most significant issue presented to him.

VII. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE BOARD'S ORDER.

The Regional Director's Report, which provides the foundation for the Board's order, makes clear that the investigation ascertained the statements made by the Union representatives to the employees, but did not attempt to ascertain or evaluate the impact on the employees of those statements. Rather, the Regional Director stated that the Union's conduct did not impair the employees' freedom of choice, citing the Board's decision in *Weyerhaeuser Company,* 146 NLRB 1. He then stated (R. 10):

> "On the basis of the foregoing and the entire investigation, the undersigned concludes and finds

> that the employer's objections *do not raise substantial or material issues* with respect to the election and they are hereby overruled." (R. 5.) (Emphasis supplied.)

It seems clear that the Regional Director's view of the law led him to conclude that it was unnecessary for him *to consider the factual issues and to make factual findings* as to the possible effect on the employees of the Union's conduct.

There is no evidence in the record to fill this gap caused by the Regional Director. Accordingly, the Board's order should not be enforced.[17]

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[17]This is not the first time the Board has attempted to by-pass its normal functions of investigation and fact-finding through the adoption of *per se* rules, policies or conclusions. See cases cited in *NLRB v. Brown, supra,* 380 U.S. at 291, footnote 5.

CONCLUSION

It is respectfully submitted that upon the record in this case the Court should conclude:

(1) That Respondent did not engage in an unlawful refusal to bargain in violation of Sections 8(a)(5) and 8(a)(1) of the Act;

(2) That Respondent has committed no unfair labor practices whatsoever; and

(3) That the Decision and Order of the National Labor Relations Board in this matter should be denied enforcement in its entirety.

Dated, San Francisco, California,
February 27, 1968.

Respectfully submitted,
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By WESLEY J. FASTIFF,
JAMES A. CARTER,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

WESLEY J. FASTIFF

JUN 24 1968

No. 22,338

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CONTINENTAL NUT COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

PETITION FOR REHEARING

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For the Ninth Circuit

National Labor Relations Board,	*Petitioner,*
vs.	
Continental Nut Company,	*Respondent.*

On Petition for Enforcement of an Order of the National Labor Relations Board

PETITION FOR REHEARING

The Respondent respectfully petitions this Honorable Court for a rehearing, *en banc,* from the decision of this Court dated May 22, 1968.

I

The Court states that:

> "The Regional Director made a full investigation . . ." (Opinion, p. 3)
>
> * * *
>
> "The employer . . . [does not assert] that the Regional Director in making his determination was arbitrary or capricious or that his determination was not in conformity with . . . the provisions of the Act." (Opinion, p. 4)

The above-quoted statements are erroneous. Respondent argued that the Regional Director's failure to investigate all of the relevant facts, and particularly the *sole* crucial fact in issue, was arbitrary and capricious. (Brief, p. 4) Respondent also argued that certain of the Regional Director's *legal* determinations were not in conformity with the provisions of the Act. (Brief, p. 18)

II

Respondent argued that the Regional Director's *legal* determinations, which were argued to be erroneous, were subject to review by this Court, based upon *NLRB v. Hood Corporation,* 346 F.2d 1020. (Brief, p. 6) The Court cited the *Hood* case for the proposition that in "such circumstances" the Regional Director's determination cannot be overturned by a court. (Opinion, p. 4) In view of the fact that "such circum-

stances" referred to the Court's erroneous understanding of the issues presented, it seems clear that the Court's analysis of the *Hood* case is inapposite to any issue in this case.

III

The Court states that:

> "The purpose of the courts in refraining from reviewing determinations made by Regional Directors on objections to Labor Board elections is discussed in N.L.R.B. v. J. W. Rex Co., 243 F.2d 356, 358 (CA 3). That purpose is, of course, to provide for the final settlement without delay of disputes concerning objections to such elections. When the parties have, as in the instant case, entered into a consent election agreement, they have done so for the purpose expressed by the court in the Rex case." (Opinion, p. 4)

This statement is inaccurate. First, the holding attributed to the *Rex* case is not supported by the opinion in that case. Secondly, the "purpose" of the courts in reviewing determinations made under consent election agreements should be to interpret such agreements and apply the agreements, or other legal principles, to the issues presented for decision. The "purpose" or object sought to be achieved *by the parties* to such agreements should not be permitted to circumscribe the limits of judicial review. Thirdly, there are no facts in this record as to the parties' "purpose" and this Court is not in a position to state, as a matter of *law,* the "purpose" which induces employers and unions to enter into consent election agreements. An

employer and union may enter into such an agreement for various reasons and this Court may not assume, much less categorically state, that *all* parties enter into such agreements for a specific purpose and, based upon that assumption, deny a party effective judicial review.

IV

The Court states that the Respondent is:

> ". . . seeking to narrow the powers of the Regional Director, . . ." (Opinion, p. 5)

The Respondent is not seeking to narrow the powers of the Regional Director, but is seeking a determination of his *duties* and judicial review of *legal* determinations made by the Regional Director. It was argued that the Regional Director failed to discharge his duties under the agreement (Brief, p. 4) and that the *legal* determinations which are challenged in this case are not "final" under the terms of the consent election agreement and the Board's Rules and Regulations. (Brief, p. 9)

V

The Court states that the Respondent's:

> ". . . theory is that its objection is based upon a question of fact decided erroneously by the Regional Director and that questions of fact are not included within this court's language, 'procedural and substantive,' used in the Hood case." (Opinion, p. 5)

We must confess that we are at a loss to understand the basis for the foregoing statement. Our Brief

contains no assertion that the Regional Director made an erroneous finding of fact, nor can we find any language from which the Court could have drawn the inference that we were challenging findings of fact. On the contrary, Respondent repeatedly asserted that only *legal* determinations of the Regional Director were being challenged. Respondent also challenged the Regional Director's failure to fully investigate the facts and make findings of fact based thereon, but no factual finding that the Regional Director did make was challenged.

The language quoted above also attributes to Respondent certain arguments based upon the words "procedural and substantive" as used in the *Hood* case. Respondent made no argument in its Brief to the Court based upon the words "procedural and substantive", although it did make such an argument in its Answer in Opposition to Petitioner's Motion for Preliminary Relief. The Court's statement, if it is based upon the argument set forth in the Answer, is inaccurate because we there argued that "procedural and substantive" *did* encompass matters of *fact* or procedure. (Answer, p. 18) In substantiation of this argument we quoted from the Board's Rules and Regulations and underlined for emphasis the language authorizing the Regional Director to ascertain the "facts". We continued by arguing that the Regional Director's "legal interpretations are given no protection by virtue of the execution of a consent election agreement." (Answer, p. 19) At no point in our Answer did we assert that the Regional Director made

erroneous findings of fact or that questions of fact are not included within the language "procedural and substantive".

VI

The Court's opinion is not responsive to the issues presented on this appeal. The thrust of Respondent's Brief and oral argument before this Court was that the Regional Director, based upon erroneous *legal* determinations, did not carry out his duties pursuant to the consent agreement, in that he did not investigate and make certain factual determinations which are crucial to the proper resolution of this case.

For the foregoing reasons, we respectfully submit that this Petition for Rehearing should be granted.

Dated, San Francisco, California,
June 18, 1968.

LITTLER, MENDELSON & FASTIFF,
By WESLEY J. FASTIFF,
JAMES A. CARTER,
Attorneys for Respondent and Petitioner.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Wesley J. Fastiff,
Attorney for Respondent and Petitioner.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 22340

APPELLANTS' BRIEF

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants,	)	
vs.	)	No. 22340
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANTS' BRIEF

STATEMENTS OF FACTS AND PLEADINGS DISCLOSING JURISDICTION

The Court has jurisdiction to review the final judgment of conviction of each of the appellants of the offense of smuggling and concealing heroin in violation of 21 U.S.C. 173 and 21 U.S.C. 174 on the ground that 28 U.S.C. 1291 provides for appeal to the courts of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court. The trial in this matter, before the Honorable William P. Copple, Judge, was held without a jury in the United States District Court for the Southern District of California at San Diego on June 14, 1967. On June 15, 1967, Judge Copple

adjudged each appellant guilty "on both counts" (21 U.S.C. 173 and 21 U.S.C. 174). On the same date, appellants made a motion for a new trial and said motion was denied. On July 31, 1967, Judge Fred Kunzel ordered that each of the appellants be committed to the custody of the attorney general or his authorized representative for imprisonment for a period of seven years on the count alleging a violation of 21 U.S.C. 173 and seven years on the count alleging a violation of 21 U.S.C. 174. The seven-year sentences were to run concurrently. The indictment specified only a violation under 21 U.S.C. 174 (RT 2). On the same day, notice of appeal to the United States Court of Appeals for the Ninth Circuit was made by the appellants. On September 11, 1967, appellants were granted an extension of time to October 9, 1967, for filing the designation of documents pending the appeal. On September 29, 1967, said designation of documents on appeal was filed with the United States District Court.

STATEMENT OF THE CASE

Appellants' appeal the judgment of the conviction against them pursuant to a trial without jury resulting finally in a judgment of guilty and a sentence of imprisonment of each appellant for two terms of seven years, to run concurrently. Appellants' appeal is directed to the determination that each of them is guilty of the crimes of smuggling and concealing heroin in violation of 21 U.S.C. 173 and 21 U.S.C. 174. Appellants maintain that the District Court erred

in finding appellants guilty; that there was insufficient evidence to find appellants guilty; and that the District Court erred in failing to dismiss the indictment as to both appellants.

QUESTIONS PRESENTED

1. Does Count One of the indictment set forth a criminal offense?

2. Was appellants' act in failing to pay tax and register the contraband constitutionally protected?

3. Did any act of smuggling or importing occur?

4. Did appellant Johnnie Charles Murray know that he was attempting to bring a narcotic drug into the United States?

5. Did appellant Lonnie Melvin Murray have "possession" of the heroin so as to raise the presumption in the final paragraph of 21 U.S.C. 174?

SPECIFICATION OF ERRORS

1. Count One of the indictment is defective, and it was an error to enter a judgment of guilty based thereon.

2. The Court erred in failing to dismiss the indictments as to both appellants for the reason that payment of the required tax and registration necessary for legal importation would violate appellants' rights against self-incrimination.

3. As a matter of law, no act of smuggling or importing occurred, and the Court erred in failing to dismiss the indictment as to both appellants.

4. There was insufficient evidence to find appellant Johnnie Charles Murray guilty.

5. There was insufficient evidence to find appellant Lonnie Melvin Murray guilty.

ARGUMENT

Appellants, Johnnie Charles Murray and Lonnie Melvin Murray, are brothers who resided in San Francisco at the time of the alleged incident. On the morning of February 11, 1967, the appellants traveled from San Francisco to Los Angeles by airplane. Their stated purpose for going to Los Angeles was to visit their niece, nephew and a girl that Lonnie Melvin Murray was interested in. When they arrived in Los Angeles, at about 9 o'clock A.M., they contacted Albert Scott, known as Slim. Appellants borrowed a car from Albert Scott and drove to Mexico. Shortly before 8 o'clock P.M. on the same day, the appellants arrived at the port of entry in San Ysidro, California. At that time, driver, Lonnie, and the passenger, Johnnie, were questioned about their citizenship and asked what they had purchased in Mexico. They declared nothing. The United States customs inspector referred them for a secondary inspection. The inspector and another inspector escorted Lonnie into the search room, but found nothing. Then they escorted Johnnie into the search room and told him to empty everything out of his pockets, which he did, and then told him to remove his

coat. As he removed his coat, the customs inspector discovered two rubber contraceptives tied with string around the bicep of Johnnie's left arm. The contraceptives contained a substance that was later identified as heroin.

1. Based upon the foregoing facts, the appellants were arrested and charged with violation of 21 U.S.C. 173 and 21 U.S.C. 174. These sections of the law provide that the importation of narcotic drugs is prohibited, with certain exemptions. Section 173 does not set forth a penalty for such an offense. Section 174 sets forth a penalty for this offense and states what shall be deemed sufficient evidence to authorize a conviction. Both statutes refer to a single offense, and only one crime occurs from the violation thereof. Furthermore, section 173 simply requires the forfeiture of illegally imported narcotic drugs. Section 174 provides the criminal penalty. Therefore, it was an error by the district court to regard these two counts as setting forth separate and different offenses. Count One of the indictment as to each appellant does not allege a crime, and a conviction based thereon was in error. For this reason, it is respectfully submitted that as to each appellant, the conviction under Count One of the indictment be reversed.

2. The heroin was seized on the grounds that it was imported "contrary to law" as specified in 21 U.S.C. 174. In order to import heroin in conformity with the law, it would have been necessary for the importing person to pay the tax

due under 26 U.S.C. 4721 and register under 26 U.S.C. 4722. Such payment and registration would have confronted appellants, or one of them, with substantial hazards of incrimination. Marchetti vs. United States (Jan. 29, 1968) 88 S.Ct. 697. In this case, the reasoning of former cases that the privilege against self-incrimination does not apply to prospective acts was expressly overruled. The court states:

> "Substantial hazards of incrimination as to past or present acts plainly may stem from the requirements to register and to pay the occupational tax. * * * In the first place, satisfaction of those requirements increases the likelihood that any past or present gambling offense will be discovered and successfully prosecuted. * * * Further, the acquisition of a federal gambling tax stamp, * * *, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes" (88 S.Ct. 705).

The Chief Justice, in his dissent, specifically includes registration under 26 U.S.C. 4722 (narcotics) and 26 U.S.C. 4753 (marijuana) as Federal statutes subject to attack (88 S.Ct. 716, 721).

This doctrine was clearly extended to importation of physical objects and possession of physical objects in Haynes vs. United States (Jan. 29, 1968) 88 S.Ct. 722. Defendant was charged with violation 26 U.S.C. 5851 of knowingly possessing a firearm which had not been registered with the Secretary of the Treasury as required by 26 U.S.C. 5841. A registration requirement, being directed at persons inherently suspected of criminal activities, gives rise to real and substantial hazards of self-incrimination. Importers and

manufacturers and dealers of proscribed firearms are obliged each year to pay special taxes. The court reversed defendant's conviction on the ground that the registration requirements violated defendant's constitutional privilege against self-incrimination.

If Johnnie and Lonnie had disclosed the existence of the heroin for purposes of paying the tax (assuming one or both of them knew there was heroin to report), they would have exposed themselves to prosecution for possession of the narcotic. So the requirement that they register the material before bringing it into the United States would have required them to incriminate themselves. Therefore, their failure to comply with the requirements of 26 U.S.C. 4751 and 26 U.S.C. 4722 was not unlawful, and the heroin was not imported "contrary to law" as specified in 21 U.S.C. 174.

3(a). The appellants were in a vehicle at the border crossing when the incident took place. They are charged with the offense of smuggling a narcotic drug into the United States. Nowhere in 21 U.S.C. 173 or 21 U.S.C. 174 is an offense of attempting smuggling set forth. It has been the law of the United States since 1899 that attempts to smuggle are not smuggling. In Keck vs. United States (1899) 172 U.S. 434, 19 S.Ct. 254, 43 L.Ed. 505, the United States Supreme Court carefully and exactly defined the term "smuggling." The facts of that case were that the captain of a vessel had in his cabin some diamonds he intended to send to a diamond company

in Cincinnati, Ohio, without the payment of the necessary duty. The ship entered American waters and was approaching the moorings at the harbor in Philadelphia when an agent of the Treasury Department boarded the ship. After a conversation with the captain, the Treasury Department agent asked the captain to get the diamonds. The captain did so. The captain was then charged with smuggling and the court states that there was no passage of the packages of diamonds through the lines of custom authorities, but on the contrary the packages were delivered to the customs officer on board the vessel itself, at a time when or before the obligation to make entry and pay the duties arose. For this reason, the offense of smuggling was not committed.

This case was discussed in Ortez vs. United States (5 Cir. 1964) 329 F.2d 381. In that case, the court held that the Keck case was not controlling in a marijuana smuggling case because the tax due under 26 U.S.C. 4751 and the registration required under 26 U.S.C. 4753 must be paid before the importation, and the duty due on the diamonds was to be paid at the time of importation. The distinction on a rationale related to Federal taxing statutes which seek to locate activity or physical objects in order to expose criminal activity are no longer valid. (See Marchetti vs. United States, supra; Grosso vs. United States (Jan. 29, 1968) 88 S.Ct. 709; and Haynes vs. United States, supra.)

3(b). This Court in Wong Bing Nung vs. United States (9 Cir. 1955) 221 F.2d 917, following Keck vs. United States, supra, reversed a judgment of conviction based upon a charge of smuggling wherein Wong's goods were seized aboard a ship in the harbor. As a part of that decision, this Court recognized the reasoning in United States vs. Merrell (2 Cir. 1934) 73 F.2d 49 and Gillespie vs. United States (2 Cir. 1926) 13 F.2d 736. The distinction set forth in those cases is that "imports contrary law" is distinguished from "smuggling" when the defendants are not charged with having smuggled the goods, but are charged with having facilitated the transportation of the goods after they have been smuggled and with the knowledge that they had been brought into the country contrary to law. The defendants in Gillespie vs. United States, supra, were arrested after the smuggled goods had been taken from a ship and were lying on the dock or had been carried away by automobiles. In United States vs. Merrell, supra, the court reversed the judgment as to smuggling and affirmed on the facilitation charge of the transportation of smuggled merchandise after importation.

The first occasion upon which a person may present narcotic durgs for purposes of bringing them through the United States is at the border. At this point, the customs officer received the contraband. At most, the evidence shows an attempt to import or smuggle a narcotic drug into the

United States. In this case there was no importation and therefore the crime of facilitating transportation of imported heroin was not committed. This is a true attempted smuggling case. For this reason, it is respectfully submitted that the convictions of both appellants be reversed and set aside as to all counts.

4. There are four elements of the crime as set forth in 21 U.S.C. 174:

1. Doing one of the physical acts limned in the statute,

2. Doing such an act "fraudulently or knowingly,"

3. The illegal importation of the narcotic drug, and

4. Knowledge of the illegal importation.

The final paragraph of section 174 makes possession of the narcotic drugs sufficient evidence as to all four elements "unless the defendant explains the possession to the satisfaction of the jury" (United States vs. Llanes (2 Cir. 1967) 374 F.2d 712).

Where the issue is knowledge that the substance with which the appellant was performing a prohibited act was a narcotic drug, he can negate the inference, e.g., by explaining that he thought the substance was something else (United States vs. Llanes, supra). Johnnie states that he had been drinking quite a bit that afternoon and that about 4 P.M. he met a man whom he had known earlier in Los Angeles, California. He states that the man told him that if he would

take an object to a location in Los Angeles, California, the man would give Johnnie $150.00 when he arrived (RT 65). He states that he did not know for sure that he was smuggling and that if he had, he would not have done it (RT 75). He further testified that when he was a child he was hit by a truck and had amnesia for eight or nine weeks. He stated that he was in a coma all during that time and has occasional lapses of memory (RT 70). At no time did the prosecution ever attempt to establish that Johnnie knew that he was importing a narcotic drug into the United States. There is a total absence of proof that Johnnie had any knowledge that what was in the contraceptives was in fact heroin. Rather, the evidence establishes that he had been drinking, that he has lapses of memory resulting from a childhood accident, and that although he knew that he was bringing something across the border, he did not understand the purpose of his act. Therefore, it has not been established that Johnnie was doing such an act "fraudulently or knowingly." Nor has it been established that Johnnie had knowledge of the illegal imporation.

Apparently the government rests its entire case on possession of the drug by Johnnie. It is the government's position that the presumption arising from the final paragraph of section 174 is sufficient evidence as to all four elements of the crime because the narcotic drug was found on Johnnie's person. However, Johnnie has given an explanation for his acts.

5. The same test as to the four elements of the crime must be applied to Lonnie.

Lonnie did not, without the benefit of the presumption in the final paragraph of 21 U.S.C. 174, do a physical act set forth in the statute.

The evidence clearly shows that at the time the contraband was discovered, it was in the sole possession of Johnnie. It was physically attached to his body by a string. Although Johnnie's body was in the car, the immediate area of concealment of the contraband was the very muscles of Johnnie's arm.

The question as to whether the narcotic was illegally imported is discussed under parts 2 and 3 of the Argument in this brief, and the remaining two elements of the crime involve "knowledge."

On the crucial issue of knowledge, there must either be evidence of such knowledge, or evidence of possession to raise the presumption of the last paragraph of section 174 (United States vs. Llanes, supra). The only reasoning offered by the Court on this issue is a doubt that Johnnie would fail to tell Lonnie about the contraceptives attached to his arm. It is clear that the evidence is not sufficient as to Lonnie without reference to the presumption arising from possession. Therefore, Lonnie's conviction must rest upon evidence that Lonnie had possession of the narcotic drug.

A basic element of the offense of smuggling, indeed the sine qua non of it is possession in appellant. (See Ortez vs. United States (5 Cir. 1964) 329 F.2d 381.) Evidence of

intimate personal relationship does not infer guilt. Such evidence gives rise to a suspicion. But a suspicion, however strong, is not proof and will not serve in lieu of proof. (See Evans vs. United States (9 Cir. 1958) 257 F.2d 121.) When possession is solely in one person, circumstantial evidence is insufficient to show possession in another (Bass vs. United States (8 Cir. 1964) 326 F.2d 884).

Possession as used in 21 U.S.C.A. 174 means "dominion and control * * * so as to give power of disposal" (Rodella vs. United States (9 Cir. 1960) 287 F.2d 306, 311-312).

Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support the finding of possession. (See Arellanes vs. United States (9 Cir. 1962) 302 F.2d 603, certiorari denied, 371 U.S. 930, 83 S.Ct. 294, 9 L.Ed.2d 238.)

Possession is attributed to Lonnie for the following reasons stated by Judge Copple in his decision (RT 136-8).

1. Appellants are "fairly close brothers who moved from Los Angeles to San Francisco and whether or not they lived at the same address, at least the evidence is clear that they saw each other every day."

2. In was, in the view of the Court, "fairly obvious that Lonnie is the stronger character and the leader of the two, the more intelligent of the two."

3. The appellants flew together from San Francisco to Los Angeles on the morning of February 11, 1967, and the

trip to Los Angeles was Lonnie's idea.

4. Lonnie paid the fare for both appellants to Los Angeles.

5. The Court concluded that they left Los Angeles for Tijuana within an hour of the time they arrived at Los Angeles.

6. Lonnie wanted to borrow an automobile and did so.

7. Lonnie wanted to go to Tijuana.

8. They went to Tijuana together.

9. They remained there most of the time together, although the Court concedes that they were probably separated from time to time because "the nature of their trip and their reasons for going to Tijuana and their activities there" so required.

10. They returned together.

11. It "stretches the credibility of the Court to believe that under all the circumstances, the relationship between the brothers, that he (Johnnie) would not have told his brother (Lonnie) about the $150 windfall and how he planned to get it."

12. The boys are intelligent.

Not one of the twelve pieces of conclusions relied upon by the Court is incriminating. There is an absolute lack of any evidence of any plan for the use of the heroin by the parties. Nor is there any conceivable design in which they both might fit for purposes of showing possession was

joint. Again, not one fact can be pointed to by the Court to show any connection between Lonnie Melvin Murray and Johnnie Charles Murray in regard to the heroin except that the Court does not believe that, being brothers, Johnnie would not tell Lonnie about the existence of the contraceptives attached to his arm. Such suspicion will not substitute for proof (Evans vs. United States (9 Cir. 1958) 257 F.2d 121).

This list of allegedly highly incriminating circumstances which support the conviction of Lonnie on the charge of smuggling heroin into the United States is to be compared with the decision of this Court in the cases of Orozco-Varquez vs. United States (9 Cir. 1965) 344 F.2d 827 and Arellanes vs. United States (9 Cir. 1962) 302 F.2d 603.

In the Orozco-Vasquez case, defendant Molano was convicted relating to one narcotics sale on one day on the following evidence:

> "(a) that Molano had been defendant Vasquez' boy friend for at least 3 or 4 weeks'; (b) one Esquivel made an appointment with Ramirez (no mentioned of Molano); (c) Molano arrived at Vasquez' home and watered the lawn; (d) Molano drove Vasquez and parked the auto within a block of where Vasquez contacted the stool pigeon Esquivel outside of Molano's presence; (e) that the auto, though traveling several blocks, was parked within fifty yards of Vasquez's house; (f) (no mentioned of Molano, except that Vasquez 'left' him); (g) Vasquez then returned and talked to Molano; (h) Vasquez left the car, delivered heroin, was paid and returned to Molano; (i) Molano and Vasquez drove fifty yards to Vasquez' home, Molano continued to water the lawn; (j) Vasquez never said she concealed what she was doing from Molano; (k) Vasquez testified falsely as to her conduct; (1) Vasquez' story as to why Molano waited for her in the auto was 'obviously false'; (m) the jury could have inferred Molano was a look-out;

(n) the jury could infer that Vasquez might have conferred with Molano with respect to narcotics.

"To pound the nail in the coffin of proof of Molano's alleged possession, the government informs us that Molano neither testified, nor called witnesses, on his own behalf!

"At best we know Molano on one day twice watered a guilty defendant's lawn and drove that same defendant (his girl friend) to and from an appointment where narcotics were sold, but in which sale he did not participate, and at which he was not present.

"There was never any proof Molano ever had any personal, actual possession of narcotics, nor constructive possession of them, nor knowledge of their presence in someone else's possession in the car he drove (if they were present). He never received, nor had even temporarily in his possession, any fruit of a sale.

"The government states this evidence summarized above, 'is more than sufficient to support the conviction of Molano.' We assume it is stated most favorably to the government. We have examined the record and find that it was thus most favorably presented as to Molano's guilt.

"We find no substantial evidence to support his conviction. We feel certain that had defendant Molano been the only defendant he would never have been convicted, and probably never prosecuted" (344 F.2d 829).

In the Arellanes case, this Court stated as follows:

"The evidence, viewed most strongly for the Government, establishes: (1) that Geneva Arellanes is married to Alfredo Arellanes; (2) that she stayed with him for a time at the apartment where the narcotics were subsequently found; (3) that she accompanied her husband on the trip and was with him in the car in which other narcotics were found; (4) that she made an idle reference to the narcotics in a remark to Mrs. Benton subsequent to the arrest and search and after disclosure of the marijuana in the car had been made to everyone present. On the basis of this, the Government states that

'Where the narcotics were, there also was Geneva Arellanes.' We cannot view this as a conclusively incriminating circumstance because the presence of the narcotics is also exactly coincidental with the presence of her husband, and Mrs. Arellanes' presence with both is as fully explained by her attachment to her husband as it might be by a control over the drugs. These facts might indeed to said to establish that that part of the charge related to the facilitation of transportation, but they cannot show the possession or control which the Government must establish to raise the presumption of guilty knowledge. There was, we point out, no showing here of the elements of joint venture, as in Eason vs. United States (9 Cir. 1960) 281 F.2d 818, 821."

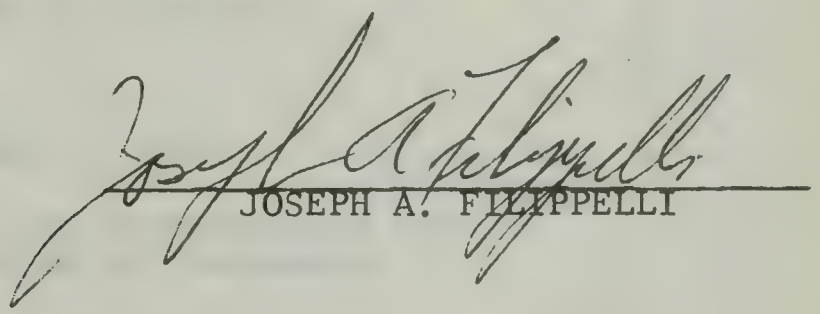
The peculiar manner in which the appellants went to Tijuana is set forth in the transcript of record. It is a matter of common knowledge that there is very regular, inexpensive, and expeditious air transportation between San Francisco, Los Angeles and San Diego. For an additional payment of less that $7.00, a person flying to Los Angeles may simply sit on the same airplane until he arrives in San Diego. At that point a person may go to Tijuana in any of several simple, inexpensive ways. However, it is assumed by the Court that the way in which two "intelligent boys" would plan a conspiracy to go to Tijuana for the purpose of smuggling heroin into the United States would be to fly to Los Angeles, borrow a Buick automobile at least twelve years old and drive to Tijuana.

At the time of sentencing, Judge Fred Kunzel commented on Judge Copple's decision as follows:

"* * * he just felt that it was improbable--highly probable--that Johnnie brought the contraband across and didn't appraise him (Lonnie) of what was happening (RT 3, July 31, 1967).

It is clear that there is no evidence to support a conclusion that Lonnie was in a joint venture with Johnnie. It was error for the judge to rely upon his feeling that Johnnie and Lonnie were such dependent sieblings that the action of Johnnie must include Lonnie. Such a feeling is not evidence, and can give rise to no more than a suspicion. And, a suspicion will not serve in lieu of proof. (See Evans vs. United States (9 Cir. 1958) 257 F.2d 121.) There is no proof of possession by Lonnie, and therefore his conviction should be reversed.

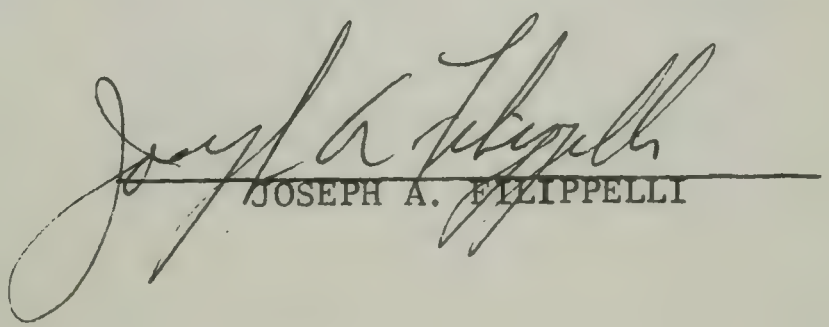
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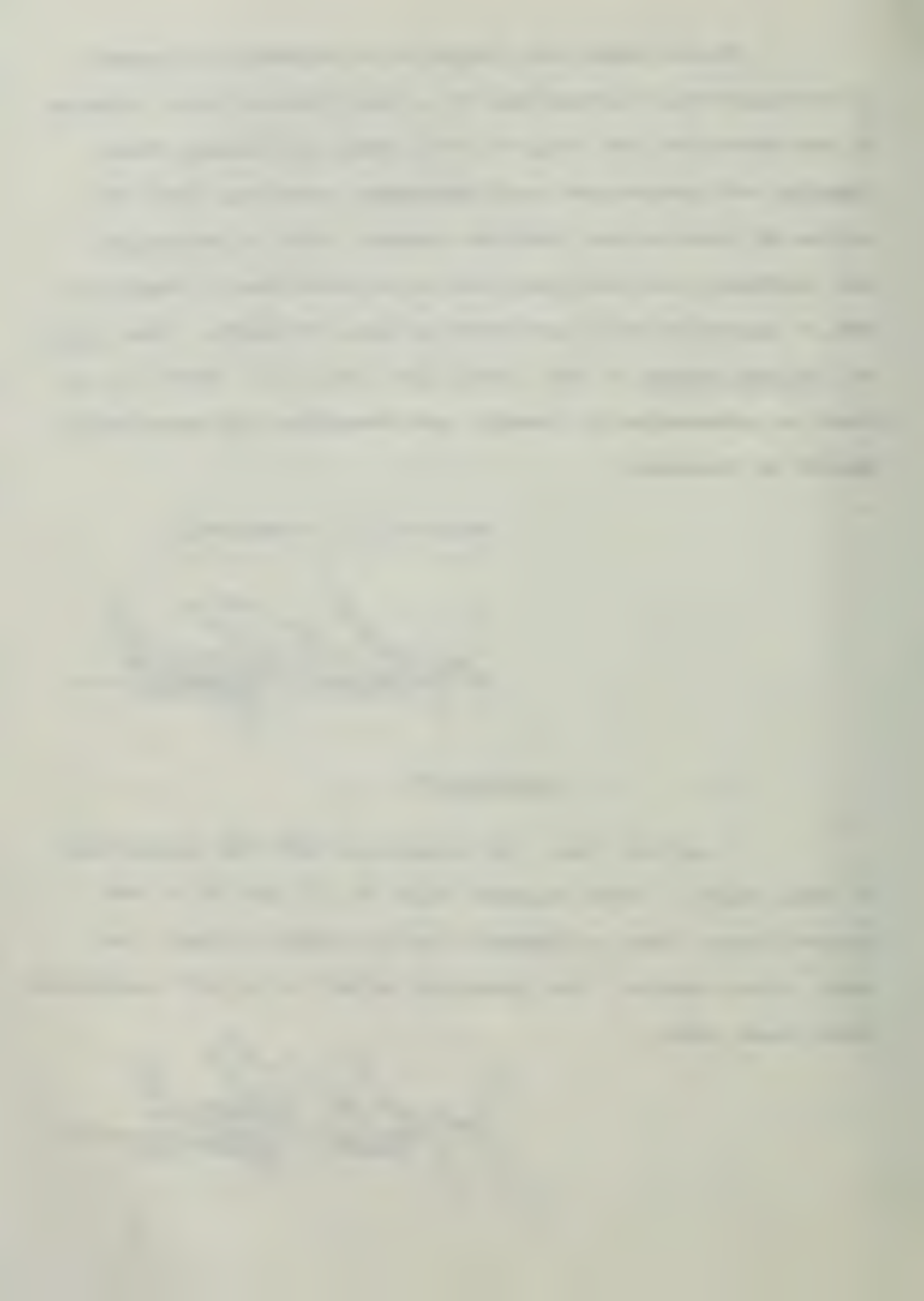
JOSEPH A. FILIPPELLI

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rule 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOSEPH A. FILIPPELLI



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CERTIFICATE OF SERVICE BY MAIL

UNITED STATES)
)
COURT OF APPEALS) No. 22340
)
FOR THE NINTH CIRCUIT)

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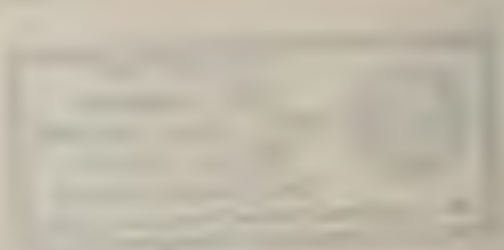
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Subscribed and sworn to before me this 11th day of April, 1968.

Mary L. Woodside



IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUL 19 1968

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 22340

FILED

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellants to be guilty as charged in Counts One and Two of a two-count indictment following trial without a jury.

The offenses occurred in the Southern District of California. The District had jurisdiction by virtue of Title 18, United States

Code, Section 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellants were charged in two counts of a Two-Count indictment. The first count alleged that appellants knowingly imported and brought approximately four ounces of herion into the United States from Mexico.

The second count alleged that appellants knowingly concealed and facilitated the transportation and concealment of approximately four ounces of herion, knowing it had been imported and brought into the United States contrary to law.

On June 14, 1967, appellants were tried without a jury before United States District Judge William B. Copple [R. T. 1-3].[1] Appellants were found guilty by Judge Copple as charged in Counts

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1/ "R. T." refers to the Reporter's Transcript of Proceedings.

One and Two on June 15, 1967 [R. T. 138, C. T. 7].[2] On July 31, 1967, Judge Fred Kunzel committed appellants to the custody of the Attorney General for a period of seven years on each of Counts One and Two to run concurrently [C. T. 9, 10].

III

ERROR SPECIFIED

Appellants specified the following points upon appeal:

"1. Count One of the indictment is defective, and it was an error to enter judgment of guilty based thereon.

"2. The Court erred in failing to dismiss the indictments as to both appellants for the reason that payment of the required tax and registration necessary for legal importation would violate appellants' rights against self-incrimination.

"3. As a matter of law, no act of smuggling or importing occurred, and the Court erred in failing to dismiss the indictment as to both appellants.

"4. There was insufficient evidence to find appellant

2/ "C. T." refers to Clerk's Transcript of Record.

Johnnie Charles Murray guilty.

"5. There was insufficient evidence to find appellant Lonnie Melvin Murray guilty."

[Appellants' Opening Brief, p. 3-4]

IV

STATEMENT OF FACTS

On February 11, 1967, appellants entered the United States from Mexico at the Port of Entry in San Ysidro, California. Appellant Lonnie Murray was driving the car [R. T. 28]. His brother, Johnnie Murray, the other appellant was the passenger in the car. Appellants stated to primary Customs Inspector, Rudolph L. Dale, that they were U. S. citizens and that they had purchased nothing in Mexico [R. T. 29]. Inspector Dale had the driver open the trunk in which nothing was found [R. T. 29]. After speaking with appellants Inspector Dale accompanied them to the secondary inspection area. Inspector Dale escorted appellants into the office and proceeded, in the company of another inspector, to search the driver in the search room. Nothing was found on Lonnie Murray

[R. T. 29]. The passenger, Johnnie Murray, then was escorted to the search room and asked to empty his pockets and to remove his coat [R. T. 30]. When coat was removed, two rubber contraceptives were found tied by string around the left bicep of the passenger [R. T. 30].

Customs Agent Randolph R. Aros was called. He testified that he questioned Johnnie Murray first and Johnnie admitted having the contraband [R. T. 39]; Johnnie at first stated he and his brother came down from San Francisco the day before, but later when he saw Agent Aros viewing a PSA ticket stub, changed his story to the same day as the arrest [R. T. 39, 42-43]. Johnnie said he was approached by a white male he did not know who offered him $150.00 to take the contraband into the United States [R. T. 39]. He couldn't describe the location where he met this man and said he was supposed to deliver the contraband in Los Angeles where he (Johnnie) lived at no definite time but sometime later that evening [R. T. 39-40, 41].

Agent Aros next questioned Lonnie Murray who stated he and his brother had once lived in Los Angeles but had moved to San

Francisco and that their current address was on Eddy Street.

On cross-examination Agent Aros testified that Johnnie stated he didn't know what the contents of the package were but thought there was something wrong [R. T. 42]; that Johnnie said Lonnie knew nothing about the transaction as he was not present at the time [R. T. 43]; that Lonnie stated he and his brother lived at 1430 Eddy Street, San Francisco; however, they had given another address to the searchers [R. T. 45].

On redirect Aros testified that Johnnie said he and his brother were separated around 4:00 p.m. while Lonnie said around 3:00 p.m. [R. T. 49]. Johnnie always stated he lived in Los Angeles [R. T. 52].

The contraceptives were placed with Agent Aros [R. T. 30, 37]. These remained in his custody until the 13th of February when they were turned over to the seizure clerk [R. T. 37]. The seizure clerk, Mary McIntyre, placed the two contraceptives in the vault where they remained until February 24 at which time they were sent to the Customs chemist in Los Angeles by registered mail [R. T. 5]. George S. Hill, the Customs chemist, testified that he performed a

series of tests which enabled him to form the opinion that the contraceptives contained cocaine and herion [R. T. 19]. After performing these tests, he thereupon returned the two contraceptives by registered mail to the seizure clerk who identified them at the trial [R. T. 5]. The contraband was introduced into evidence at the close of the government's case in chief [R. T. 53].

Counsel for the appellants at this point of the trial asked the court on its own motion to dismiss Counts I and II of the indictment on Lonnie Murray alleging that no corpus delecti had been shown nor had a prima facie case been established. This point was argued and the court denied the motion allowing its renewal at the end of the case [R. T. 59].

Appellant Johnnie Murray, the passenger, testified on his own behalf and stated that he lived in San Francisco at 2028 Scott Street at the time of his arrest; that he had flown to Los Angeles with his brother who lived on Eddy Street on February 11, 1967 [R. T. 60-61]. The purpose of the trip was to visit his niece and nephew and some old friends [R. T. 62]. They visited with the nephew "a couple three hours" [R. T. 62]. Then they visited a friend, Albert Scott, nick-

named Slim, from whom Lonnie borrowed a car. After borrowing the car they got to drinking and decided to drive to Tijuana [R. T. 63]. They left Los Angeles at approximately 10:00 and arrived in Mexico around 12:00 [R. T. 64]. After arriving in Mexico they continued the drinking which they had begun in Los Angeles and visited houses of ill repute [R. T. 64-65]. At one time when the brothers were separated a man approached Johnnie and offered him $150.00 to take the narcotics across the broder to Los Angeles where the man would meet him and pay him. The man tied the contraceptives to his arm. Johnnie stated that he had no knowledge of what the object tied to his arm was [R. T. 65], and that he did not tell Lonnie about the incident [R. T. 66] and that Lonnie had no part in the transaction [R. T. 68]. He denied telling Aros he was living in Los Angeles [R. T. 67].

On cross examination Johnnie testified that he saw his brother in San Francisco nearly every day [R. T. 71]; that they probably arrived in Los Angeles about 9:00 [R. T. 72]; took a cab to the home of the niece and nephew; visited with them [R. T. 71]; and then borrowed the car. He stated that at about 4:00 the brothers separated at which time the incident with the man occurred. Between 4:00 and

8:00 at which time they were stopped at the customs inspection station the brothers had been driving around and drinking and visiting women [R. T. 74]. During this entire time the contraceptives were tied to his arm [R. T. 74]. He denied knowing there was something wrong or that he knew he was smuggling, but admitted the contraceptives were tied next to his skin, under his shirt sleeve, not hanging out, and also under his coat [R. T. 75]. He testified that if he had known he was smuggling he wouldn't have done it [R. T. 75] and yet admitted he answered "no" when asked if he was bringing anything from Mexico, even though he said he knew he was bringing the contraceptives [R. T. 76]. He denied seeing a mark left by the contraceptives or trying to avoid taking his coat off [R. T. 76]. He denied telling Agent Aros he was unemployed [R. T. 77]. He described the man [R. T. 77] but could not say in what part of Tijuana the incident occurred [R. T. 79].

In response to questions by the court, Johnnie stated that they had spent 30-35 minutes at the car lot where Scott worked; that they then drove around Los Angeles to visit other friends before deciding to go to Tijuana. He did not know how long they spent driving around

Los Angeles [R. T. 85-86].

The motion to dismiss the charges against Lonnie was again presented and again denied [R. T. 90].

Lonnie Murray was then called. He testified that he resided in San Francisco at the time of the arrest. The purpose of the visit was to see the niece and nephew and a girl friend of Lonnie's. After borrowing the car from Scott they went to see the girl friend. Since she was not home he suggested they go to Mexico. He stated that they spent 20-30 minutes with the niece and nephew and that they arrived in Tijuana about 1:00 or 2:00 [R. T. 97]. To account for the discrepancy in time of the testimony of the brothers, Lonnie stated that his brother had difficulty remembering times and numbers [R. T. 97]. The brothers had been drinking in Los Angeles and continued after their arrival in Tijuana where they parked the car in a pay parking lot [R. T. 98-99-100]. The brothers then separated, meeting at the parking lot about 4:00. Lonnie stated that he had no knowledge of the contraband and that he had made no agreement to procur contraband [R. T. 101].

On cross-examination Lonnie stated he had a job at the Eddy

Hotel, that he had suggested the trip to Los Angeles [R. T. 106] and had paid Johnnie's way [R. T. 114]; that they went from the airport to Slim's [R. T. 108, 109], and then went to his nephew's and niece's but only stayed at the nephew's 5 or 10 minutes [R. T. 110]; that they then went to 74th and Figerroa to see Linda (his girl friend) and though they were there only 10 or 15 minutes had 2, 3 or 4 drinks [R. T. 112]. He denied telling the officer that he borrowed the car from Slim to go to San Diego [R. T. 114], saying he mentioned he was going to stop in San Diego but he didn't stop there [R. T. 115].

On rebuttal Customs Inspector Dale testified that a noticeable mark remained on the passenger's arm after the string had been removed [R. T. 116]. This mark was still present 15 or 20 minutes after the string had been removed [R. T. 122]. Agent Aros also testified on rebuttal, stating that Lonnie told him he had borrowed the car to go to San Diego, that both defendants stated they were unemployed, and that Lonnie had said they lived together in San Francisco [R. T. 126-127].

V

ARGUMENT

A. COUNT ONE OF THE INDICTMENT IS NOT DEFECTIVE AND IT WAS NOT ERROR TO ENTER A JUDGMENT OF GUILTY BASED THEREON.

Appellants' first argument is based on an erroneous interpretation of the indictment. Appellants were charged with violating Title 21, United States Code, Section 174, as specifically set forth in the title to the indictment. The offense of smuggling is charged in Count One, the offense of transporting and concealing is charged in Count 2. Both offenses are punishable by virtue of Title 21, United States Code, Section 174. The words "contrary to law" in Section 174 refer to violation of Title 21, United States Code, Section 173, as held by this court in Charles Emanuel White and John Lewis v. United States of America (Ninth Circuit, No. 20,566, April 9, 1968) (see footnote 1 at page 8). Appellants were not sentenced for violating Title 21, United States Code, Section 173, which as appellants correctly argue sets forth no criminal penalty. Appellants were indicted and sentenced under counts alleging violations of Section 174. The first count uses

the phrase "contrary to Title 21, U.S.C. 173", the second count uses simply the phrase "contrary to law", but as stated previously these phrases are synonomous. Both counts allege crimes and there was no error in the conviction as to Count One.

B. THE COURT DID NOT ERR IN FAILING TO DISMISS THE INDICTMENTS. THE PRINCIPLE THAT CERTAIN TAXING AND REGISTRATION PROVISIONS ARE VIOLATIVE OF RIGHTS AGAINST SELF-INCRIMINATION IS NOT APPLICABLE HERE.

Appellants argue that to import heroin in conformity with the law it would only have been necessary to pay the tax under Title 26, United States Code, Section 4721, and register under Title 26, United States Code, Section 4722. However, even if the tax had been paid and the importer had registered, the importation would have remained "contrary to law" under Title 21, United States Code, Section 173, making it unlawful to import any narcotic drug except in special circumstances which are not applicable here.

Even if a payment of the tax and registration would have rendered the importation in conformity with the law, appellants' argument is still not persuasive. The reasoning of Marchetti v.

United States, 390 U.S. 39 (1968), and Gross v. United States, 390 U.S. 62 (1968) and Haynes v. United States, 390 U.S. 85 (1968), only applied to convictions under tax and registration provisions. If appellants were convicted under those provisions the reasoning of these cases is perhaps applicable, for in order to avoid punishment for failure to pay a tax or register they would have had to disclose information which would make them liable for prosecution under Title 21, United States Code, Sections 173 and 174, or State statutes prohibiting possession. In that situation appellants might be exposed to substantial hazards of incrimination which would bring them under the Marchetti, Gross and Haynes decisions. However, Marchetti, Gross and Haynes merely hold that those who assert the constitutional privilege against self-incrimination may not be punished for failure to comply with tax and registration statutes. Appellants are not being punished for failure to comply with tax or registration statutes but for importing, transporting and concealing narcotics drugs in violation of Title 21, United States Code, Sections 173 and 174. The heroin was imported, transported and concealed "contrary to law" and the court did not err in failing to dismiss the indictments.

C. AN ACT OF SMUGGLING OR IMPORTING OCCURRED AS A MATTER OF LAW, AND THE COURT DID NOT ERR IN FAILING TO DISMISS THE INDICTMENT AS TO BOTH APPELLANTS.

It is conceded that neither Title 21, United States Code, Section 173 nor Section 174 sets forth attempted smuggling as an offense and that attempts to smuggle are not smuggling. Keck v. United States, 172 U. S. 434 (1899). It is contended, however, that there was a completed act of smuggling. The aforesaid sections prohibit the importation of narcotic drugs into the territory of the United States, and the intent of Congress in enacting them was determined in Palermo v. United States, 112 F. 2d 922, 924 (1940) as follows:

> to penalize not only the importation of opium across customs lines but also the bringing of it into the territorial limits of the United States.

In Williamson v. United States, (9th Cir. 1962), 310 F. 2d 192, smuggling was defined as the bringing on shore (i. e., within the territorial limits of the United States) of goods for which the duty has not been paid or goods the importation of which is prohibited.

The decision in Ortiz v. United States, (5th Cir. 1964) 329 F. 2d 381, and the construction which appellants give it in the light of Marchetti (supra), Gross (supra), and Haynes (supra) is not applicable in this situation even if correct. We are not dealing with marihuana or other goods which are termed "smuggled" merely because the tax and registration or duty provisions have not been complied with, but with narcotic drugs, the importation of which is prohibited except under special circumstances, Title 21, United States Code, Section 173. Where there is an absolute prohibition against the importation of a particular item, the act of smuggling is complete when the item is brought within the territorial limits of the United States. (Williamson, supra; Palermo, supra). Appellants crossed the external border between the United States and Mexico, completing the act of smuggling as charged in Count One; they then transported and concealed the narcotic drugs in their possession, thus completing the act charged in Count Two.

D. THERE WAS SUFFICIENT EVIDENCE TO FIND APPELLANT JOHNNIE CHARLES MURRAY GUILTY.

Johnnie Charles Murray entered the United States with narcotic drugs concealed on his person. This was shown by the testimony of the Inspector Dale, Customs chemist Hill and the appellant himself. His possession was such as to establish both control over the drugs and knowledge of their presence. (Evans v. United States, 9th Cir. 1958, 257 F.2d 121, cert. denied 358 U.S. 866, rehearing denied 358 U.S. 901 (1958). The inference provided in the statute (21 U.S.C. 174) arises and provides sufficient evidence to convict unless the appellant explains his possession to the satisfaction of the trier of fact. (Green v. United States, 9th Cir. 1960, 282 F.2d 388, cert. denied 365 U.S. 804 (1961). The explanation which Johnnie provided depends entirely upon his credibility. There was no other evidence which he offered to substantiate his story. The credibility of a witness is to be determined solely by the trier of fact. (David v. United States, 148 F.2d 203, 1945). Here the story which Johnnie offered was not believed. The inference arising from the fact that he possessed

the narcotics at the time of entry into the United States remained viable (Caudillo v. United States, 9th Cir. 1958, 253 F. 2d 513).

Johnnie knew he was taking something across the border which he did not declare and which was hidden. The circumstances in which he supposedly received the contraband were unusual indeed—a strange man approached him and offered him $150.00 to take the two contraceptives and their contents across the border. Even Johnnie testified during cross examination that he was not certain that there was nothing wrong with his act [R. T. 75]. From this the requisite guilty knowledge may be inferred.

The possession of the drugs, the negative declaration, the physical act of importing, the concealment of the contraband, the failure to explain the possession to the satisfaction of the trier of fact are clearly sufficient evidence to find Johnnie Charles Murray guilty.

E. THERE WAS SUFFICIENT EVIDENCE TO FIND APPELLANT LONNIE MELVIN MURRAY GUILTY.

As appellant argues Lonnie's conviction rests largely upon the

inference arising from possession of the drug, although the trial court inferred actual knowledge of the presence of the contraband narcotics from the close relationship of the brothers. This was shown by the fact that they saw each other almost every day and traveled together. The mark left on Johnnie's arm after the string was removed indicated that the string must have been tied tightly by someone other than Johnnie. This circumstance indicates the knowledge of the presence of the contraband by someone other than Johnnie. The court did not believe Johnnie's story about the stranger which leaves Lonnie as the only other reasonable party who may have tied the string.

That Lonnie Murray was not in actual physical possession of the contraband narcotics is clear. He did, however, have constructive possession of the contraband and this is sufficient to authorize conviction. United States v. Hernandez (2nd Cir. 1961) 290 F. 2d 86. Constructive possession may be established by circumstantial evidence. Green, supra; Evans, supra; Rodella v. United States (9th Cir. 1960) 286 F. 2d 306, cert. denied 365 U. S. 889 (1961).

Circumstantial evidence is insufficient to establish constructive possession in one person only if possession is solely in another. Bass v. United States (8th Cir. 1964) 326 F. 2d 884. There is no showing that Johnnie had sole possession of the contraband narcotics, i. e., that he had the sole dominion and control of the contraband so as to give him the sole power of disposal. Rodella, supra. Lonnie had borrowed the car and had driven it to Tijuana. He was driving the car when it was stopped at the customs line. The court in Evans, supra, states at page 128:

> Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof. [i. e., possession].

Lonnie had suggested the trip to Los Angeles and the trip to Tijuana. In addition he had financed the excursion. These circumstances add support to the contention that he had dominion and control of the automobile and that Johnnie did not have sole possession. Covarrubias v.

v. United States (9th Cir. 1959) 272 F. 2d 352.

Johnnie claims that he alone was aware of the contraband and that the possession was his alone. However, there is strong evidence of a joint venture, similar to that in Eason v. United States (9th Cir. 1960) 281 F. 2d 818). Appellants were close brothers, who saw each other almost daily in San Francisco. They traveled together from San Francisco to Los Angeles. They were together in Los Angeles. They traveled together and remained together most of the time in Tijuana. The activities of the day were similar and shared. They returned from Tijuana together. These circumstances indicate that the possession was joint.

Lonnie was indeed in constructive possession of the contraband and narcotics, and without an explanation of his possession satisfactory to the trier of fact, possession raises an inference on which to base a conviction. Considering all the circumstances this inference was a reasonable one. There was sufficient evidence to find Lonnie Melvin Murray guilty.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

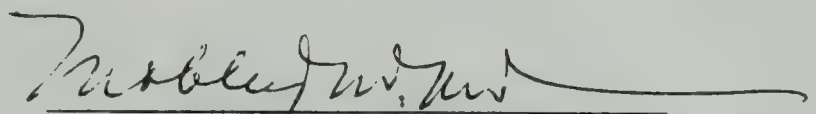
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



MOBLEY M. MILAM

IN THE UNITED STATES COURT OF APPEALS

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vs.	)	No. 22340
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANTS' REPLY BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants,	)	
vs.	)	No. 22340
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANTS' REPLY BRIEF

STATEMENT OF FACTS AND PLEADINGS

DISCLOSING JURISDICTION

The Court has jurisdiction to review the final judgment of conviction of each of the appellants of the offense of smuggling and concealing heroin in violation of 21 U.S.C. 173 and 21 U.S.C. 174 on the ground that 28 U.S.C. 1291 provides for appeal to the courts of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court. The trial in this matter, before the Honorable William P. Copple, Judge, was held without a jury in the United States District Court for the Southern District of California at San Diego on June 14, 1967. On June 15, 1967, Judge Copple

adjudged each appellant guilty "on both counts" (21 U.S.C. 173 and 21 U.S.C. 174). On the same date, appellants made a motion for a new trial and said motion was denied. On July 31, 1967, Judge Fred Kunzel ordered that each of the appellants be committed to the custody of the attorney general or his authorized representative for imprisonment for a period of seven years on the count alleging a violation of 21 U.S.C. 173 and seven years on the count alleging a violation of 21 U.S.C. 174. The seven-year sentences were to run concurrently. The indictment specified only a violation under 21 U.S.C. 174 (RT 2). On the same day, notice of appeal to the United States Court of Appeals for the Ninth Circuit was made by the appellants. On September 11, 1967, appellants were granted an extension of time to October 9, 1967, for filing the designation of documents pending the appeal. On September 29, 1967, said designation of documents on appeal was filed with the United States District Court.

STATEMENT OF THE CASE

Appellants' appeal the judgment of the conviction against them pursuant to a trial without jury resulting finally in a judgment of guilty and a sentence of imprisonment of each appellant for two terms of seven years, to run concurrently. Appellants' appeal is directed to the determination that each of them is guilty of the crimes of smuggling

and concealing heroin in violation of 21 U.S.C. 173 and 21 U.S.C. 174. Appellants maintain that the District Court erred in finding appellants guilty; that there was insufficient evidence to find appellants guilty; and that the District Court erred in failing to dismiss the indictment as to both appellants.

SPECIFICATION OF ERRORS

1. Count One of the indictment is defective, and it was an error to enter a judgment of guilty thereon.

2. The Court erred in failing to dismiss the indictments as to both appellants for the reason that payment of the required tax and registration necessary for legal importation would violate appellants' rights against self-incrimination.

3. As a matter of law, no act of smuggling or importing occurred, and the Court erred in failing to dismiss the indictment as to both appellants.

4. There was insufficient evidence to find appellant Johnnie Charles Murray guilty.

5. There was insufficient evidence to find appellant Lonnie Melvin Murray guilty.

ARGUMENT

In a "Statement of Facts" preceding the argument, the appellee makes repeated references to alleged discrepancies in statements by appellants Johnnie Charles Murray and Lonnie Melvin Murray concerning addresses and time. Customs Agent

Randolph R. Aros testified that Johnnie stated that he lived in Los Angeles. However, Agent Aros was unable to specify whether the address given by Lonnie was on 38th, 68th, 86th or Central (RT 39, 41). This testimony is so uncertain that it fails to show any discrepancy by Lonnie. The alleged discrepancy as to time is even less impressive. The discrepancy amounts to nothing more than whether the brothers arrived at Tijuana at noon or 1 P.M. and whether they separated at 3 or 4 P.M. Their testimony concerning their purpose for going to Tijuana and their activity there clearly indicates that they were not keeping close track of time. They went there "to have fun" (RT 104).

Although it is not clear what relevance these discrepancies have to any issue in this case, appellee lays so much emphasis on them that they deserve some mention so that appellants may dispose of them.

1. Count One of the indictment is defective and it was error to enter a judgment of guilty based thereon.

Appellee cites White vs. United States (9 Cir. 1968) 394 F.2d 49. In the White case, a violation of 21 U.S.C. 174 was charged in each count. In Count One of the indictment against the appellants, 21 U.S.C. 174 is never mentioned. That is the difference.

2. The principle that certain taxing and registration provisions are violative of rights against self-incrimination is applicable here.

Appellee takes the position that the privilege against self-incrimination is violated only if the prosecution is pursuant to 26 U.S.C. 4721 and 26 U.S.C. 4722. Apparently if that step is dispensed with and prosecution is taken directly under 21 U.S.C. 173 and 21 U.S.C. 174, appellee contends that the privilege is not violated. Such reasoning avoids the issue. The plain fact is that had the appellants, or one of them, had presented the narcotics for taxing and registration purposes there would have been an exposure to substantial hazards of incrimination. It may well be that the Government would not have permitted the narcotics to enter the United States in any event. However, that question could not be determined until an application was made for permission for importation. Therefore, the facts of this case come within the holding in Marchetti vs. United States (1968) 390 U.S. 39, Gross vs. United States (1968) 390 U.S. 62, and Haynes vs. United States (1968) 390 U.S. 85.

3. No act of smuggling or importing occurred as a matter of law.

Appellee has narrowed the issue on this question considerably by agreeing that appellants were convicted of smuggling. Appellee even cites Williamson vs. United States (9 Cir. 1962) 310 F.2d 192, which defines the term "smuggling." Appellee also cites Palermo vs. United States (1940) 112 F.2d 922,

in which the only reference to Keck vs. United States (1899) 172 U.S. 434 is in an entirely different context. The rule in this Circuit is set forth in Wong Bing Nung vs. United States (9 Cir. 1955) 221 F.2d 917.

It is appellee's contention that by merely moving the customs station back 5, 50, 500 or 1,500 feet from the international boundary, an act of smuggling has been completed. The consequences of such reasoning are obvious. Any person coming from Mexico with a straw hat in his suitcase has smuggled the hat for 5, 50, 500 or 1,500 feet. Because such a person has had no opportunity to declare the straw hat, the straw hat is still undeclared and concealed. A customs officer, under appellee's theory, could intercept that person at any point between the international boundary and the customs station, seize the suitcase and charge that person with smuggling. Such reasoning is not acceptable. The decision in Keck vs. United States, supra, cannot be so circumvented. Furthermore, in the Keck case, contraband was aboard a ship berthed in the port of Philadelphia at the time it was taken by the customs agent. In this Circuit, Keck vs. United States, supra, was followed in Wong Bing Nung vs. United States, supra, when the contraband was found upon a vessel in San Francisco Bay. It is absolutely clear that that San Francisco Bay is well within the territory of the United States. By these standards, it is clear that there

was no completed act of smuggling by appellants.

4. There was insufficient evidence to find appellant, Johnnie Charles Murray, guilty.

In appellants' opening brief, the evidence against Johnnie Charles Murray is discussed, including the testimony concerning Johnnie's childhood accidents and lapses of memory, and this need not be repeated.

On May 13, 1968, subsequent to the submission of appellants' brief on April 11, 1968, there was first published the decision of this Court in Henderson vs. United States (9 Cir. 1967) 390 F.2d 805. Because this case raises a substantial constitutional question concerning the legality of the search of Johnnie, it is respectfully requested that this Court consider the rule in Henderson vs. United States, supra, even though the question is raised at this late date. In the Henderson case, this Court states at page 808:

> "Thus every person crossing our border may be required to disclose the contents of his baggage, and of his vehicle, if he has one. The mere crossing of the border is sufficient cause for such a search. Even 'mere suspicion' is not required. We assume that the same rule would apply to the contents of his or her purse, wallet, or pockets. If, however, the search of the person is to go further, if the party, male or female, is to be required to strip, we think that something more, at least a real suspicion, directed specifically to that person, should be required."

Therefore, to justify a strip search of Lonnie, there must have been "at least a real suspicion" directed specifically to Johnnie. Customs Inspector Rudolph L.

Dale testified as to this question on page 29, line 5, to page 30, line 5, of Reporter's Transcript dated June 14, 1967:

"A I asked them their citizenship. They told me they were born in the United States. I asked them what they purchased in Mexico. They declared nothing.

"I had the driver get out and open the trunk and it was negative. Then I came around to the passenger's side and talked to the passenger, Johnnie, which is the gentleman to the left with the blue kerchief in his suit. So I talked to them and I decided to -- right then and there to take the car to secondary inspection.

"Q All right, and --

"A I had them both --

"Q Did you go to secondary with them?

"A Yes, sir, I did.

"Q All right, then what happened?

"A I escorted both subjects into the office, told them both to have a seat. Then another inspector and I escorted the driver into the search room and searched -- searched him, had him remove everything from his pockets, his clothing and came back negative.

"Then I escorted the passenger --

"Q Who was the passenger?

"A Johnnie, and escorted him into the search room and told him to empty everything out of his pockets in which he did and then I told him to remove his coat.

"As he removed his coat, there was a -- two rubber contraceptives tied with string around his left bicep."

Appellant, Johnnie Charles Murray, testifies as to the same effect at page 67, lines 5 through 9, of the Reporter's Transcript:

> "Q Now, when you got over to the customs station, what occurred there?
>
> "A Well, he took us in the room and told me to undress, so I just undressed. He said, 'This is what I want,' and he took it off."

This is further confirmed by the testimony of appellant, Lonnie Melvin Murray, at page 103, line 24, to page 104, line 9, of the Reporter's Transcript:

> "Q Then what happened?
>
> "A Oh, then he took me into the side room and he asked me, 'You sure you haven't got no narcotics?' I said, 'No, I haven't got any.' He said, 'What about your brother?' I said, 'He haven't either.' I said, 'We don't mess with it,' you know.
>
> "So he said, 'Well, pull off your clothes,' and I asked him, 'Well, you people always do this to people that come over to have fun?' So he said, 'This is regular routine,' so I started pulling off my clothes as he told me to pull off certain pieces and this and that."

It is very apparent that the time the strip search was conducted, there was no basis for a real suspicion that Johnnie had contraband in his possession.

Therefore, the evidence was illegally obtained, and should be suppressed. Without the evidence illegally obtained, there was no evidence to support the conviction, and the judgment of conviction should be reversed.

5. There was insufficient evidence to find appellant, Lonnie Melvin Murray, guilty.

Appellee agrees that Lonnie's conviction rests upon the inference arising from possession of the drug. Appellee also states that the court inferred actual knowledge. However, since any inference of actual possession is based upon exactly the same circumstances as those supporting any finding of "possession," the conviction is based upon possession. Appellee appears to rely somewhat upon an argument made by appellee at trial concerning a string tied on Johnnie's arm. Appellee failed to establish that the string could not have been tied by Johnnie himself and the court in no way considered this argument in deciding this case.

Appellee states that Lonnie had constructive possession of the contraband. The evidence against Lonnie is concededly circumstantial, and circumstantial evidence is insufficient to establish constructive possession in one person if possession is solely in another. (See Bass vs. United States (8 Cir. 1964) 326 F.2d 884.)

The rule as to the sufficiency of evidence in a situation such as this is set forth in Lee vs. United States (9 Cir. 1967) 376 F.2d 98, 101:

> "The test to be applied in determining the sufficiency of the evidence is whether 'reasonable minds could find that the evidence excludes every hypothesis but that of guilt.'"

Appellee disregards the fact that the contraband was not found in the car. The contraband was found upon the arm of Johnnie in a room well removed from the car. Lonnie's connection with the contraband is simply that when Johnnie was sitting in the car the contraband was also within the physical limits of the car. In effect, appellee is arguing that Lonnie had dominion and control over the body and person of Johnnie.

In Hernandez vs. United States (9 Cir. 1962) 300 F.2d 114, 116, "possession" is explained as follows:

> "* * * a defendant has 'possession' of narcotic drugs within the meaning of the statute whenever the evidence, direct or circumstantial, shows that he personally shared physical custody of the narcotic drugs or had dominion and control over them" (emphasis added).

However, the court warns as follows at page 119 of the Hernandez case:

> "But 'possession' of a third person 'imputed' to the defendant is not, in legal terminology, 'possession' of the person to whom it is attributed at all. It is instead the physical or constructive possession of another, for which the defendant is to be made liable."

The trial court did not make any findings of fact or conclusions of law. However, at pages 136 to 138 of the Reporter's Transcript, the court outlines the evidence for use on appeal. The evidence relied upon by the court is summarized in appellants' opening brief at pages 13 and 14

and need not be repeated. The trial court did not find any dominion and control by Lonnie, and did not even discuss the question. The court found a common plan between the brothers to go to Tijuana. Having found this common plan, the trial court proceeded with slight circumstantial evidence to connect Lonnie with the contraband. Then, based upon such circumstances, possession is imputed to Lonnie. It appears that in so doing the trial court based the liability of Lonnie for the possession of Johnnie upon the special rules of criminal responsibility drawn from the law of conspiracy. It is important to note that the appellants were not charged with conspiracy and the court did not find any conspiracy. Therefore, it must be concluded that the facts do not support a conviction of conspiracy.

As stated in the Hernandez case at page 121:

> "It would be anomalous indeed if proof of a common scheme or plan, admittedly insufficient to constitute a conspiracy violative of Section 174 because proof of the requisite specific knowledge was lacking, could nonetheless provide the basis for imputing the same specific knowledge for the purposes of conviction of the substantive offenses under the same statute."

The trial court apparently accepted the doctrines of vicarious liability, and the rule in this Circuit is that such liability cannot be imputed.

This rule has recently been affirmed in this Circuit in Jefferson vs. United States (9 Cir. 1965) 340 F.2d 193.

To sustain that conviction, the finding must be based upon the statutory rule of evidence arising from control of the narcotics, and not upon imputed knowledge arising from knowledge of some other alleged conspirator. Even more recently, this question has been considered by the Tenth Circuit in Mason vs. United States (10 Cir. 1967) 383 F.2d 107. Each defendant must have specific knowledge of the importation. Specific knowledge of illegal importation by one defendant cannot be imputed to other defendants.

Inasmuch as the circumstances surrounding the trip to Mexico by Johnnie and Lonnie and the subsequent finding of contraband on the person of Johnnie does not exclude, in a reasonable mind, every hypothesis but that of Lonnie's guilt, the judgment of conviction must be reversed.

Respectfully submitted,

JOSEPH A. FILIPPELLI

JOSEPH A. FILIPPELLI

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH A. FILIPPELLI

JOSEPH A. FILIPPELLI

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CERTIFICATE OF SERVICE BY MAIL

UNITED STATES	)	
	)	
COURT OF APPEALS	)	No. 22340
	)	
FOR THE NINTH CIRCUIT	)	

JOSEPH A. FILIPPELLI hereby certifies that he is an attorney admitted as an attorney and counselor of the United States Court of Appeals for the Ninth Circuit, and is a person of such age and discretion to be competent to serve papers.

That on September 4, 1968, he served a copy of the attached Appellants' Reply Brief by placing said copy in an envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address and by depositing said envelope and contents in the United States mail at the Main Post Office Building, Seventh and Mission Streets, San Francisco, California.

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JOSEPH A. FILIPPELLI

Subscribed and sworn to
before me this 4th day
of September, 1968.

NOTARY PUBLIC
State of California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 22340

FEB 2 ...
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PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 22340

PETITION FOR REHEARING

Petitioner, JOHNNIE CHARLES MURRAY, whose appeal was heard by this Court, and on which a decision was rendered and entered on November 7, 1968, respectfully requests a rehearing, and that said decision be reversed on the following grounds.

1. From a reading of the decision of this Court, it is not apparent whether this Court considered the applicability of the rule in Keck vs. United States (1899) 172 U.S. 434, 19 S.Ct. 254, 43 L.Ed. 505. The Keck case is discussed in detail on pages 7, 8, 9 and 10 of Appellants' Opening Brief and on pages 5, 6 and 7 of Appellants' Reply Brief. Appellee discusses the Keck case, supra, at pages 15 and 16 of its brief. The petitioner respectfully requests rehearing so

that this Court may direct its attention to petitioner's argument on the applicability of the rule in the Keck case, supra, as to this petitioner.

2. This decision may raise a distinction between a "strip search" in which contraband is located early in the stripping process and a "strip search" in which the contraband is not located until the final invasion of a body cavity. Petitioner respectfully submits that he was not told to simply "remove his coat" but was told to "undress." Both petitioner (RT 67) and his brother (RT 104) were told to undress. Petitioner submits that after being told to undress, petitioner's subsequent taking off of his clothing for examination by the customs officer constituted a "strip search." Petitioner seeks rehearing so that this Court may reconsider the adequacy of the record on this important constitutional question, and may consider remanding this case for further proceedings to determine whether petitioner was ordered to strip and whether the rule in Henderson vs. United States (9 Cir. 1967) 390 F.2d 805 shall apply.

Petitioner, JOHNNIE CHARLES MURRAY, respectfully submits that this petition be granted, and that this cause be reset for argument thereon.

Dated: November 20, 1968.

JOSEPH A. FILIPPELLI
Attorney for Petitioner

CERTIFICATE

I, JOSEPH A. FILIPPELLI, certify that in my judgment this Petition for Rehearing is well founded and it is not interposed for delay.

JOSEPH A. FILIPPELLI

CERTIFICATE OF SERVICE BY MAIL

UNITED STATES	)	
	)	
COURT OF APPEALS	)	No. 22340
	)	
FOR THE NINTH CIRCUIT	)	

JOSEPH A. FILIPPELLI hereby certifies that he is an attorney admitted as an attorney and counselor of the United States Court of Appeals for the Ninth Circuit, and is a person of such age and discretion to be competent to serve papers.

That on November 20, 1968, he served a copy of the attached petitioner's Petition for Rehearing by placing said copy in an envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address and by depositing said envelope and contents in the United States mail at the Main Post Office Building, Seventh and Mission Streets, San Francisco, California.

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Subscribed and sworn to
before me this 20th day
of November, 1968.

NOTARY PUBLIC
State of California

No. 22541

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. J. BUMB,

Appellant,

vs.

PACIFIC TELEPHONE &
TELEGRAPH CO.,

Appellee.

On Appeal From
The United States District Court
For the Central District of California

APPELLANT'S OPENING BRIEF

FILED

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Appellee.

APPELLANT'S OPENING BRIEF

INTRODUCTORY STATEMENT

Appellant is A. J. Bumb, the duly appointed, qualified and acting Receiver for Kendall Industries, Inc., a California corporation, debtor in Proceedings for an Arrangement under Chapter XI of the National Bankruptcy Act (11 U.S.C. §§701-709) when the Order giving rise to this Appeal was entered. Appellee, the Pacific Telephone & Telegraph Company was, at

that time, and still is a public utility corporation rendering telephone service, as a monopoly, within a designated area, including that area in which the business of Kendall Industries, Inc. is located and conducted. The Pacific Telephone & Telegraph Company claims that it was an unsecured creditor of Kendall Industries, Inc. at the time of the filing of the above-mentioned proceeding under the National Bankruptcy Act by reason of non-payment of bills for telephone service and directory advertising rendered Kendall Industries, Inc. prior to said proceeding.

JURISDICTION

The jurisdiction of the District Court is based upon the following sections of the Bankruptcy Act:

(1) Section 343, (11 U.S.C. §743), authorizes the conduct of the Debtor's business for such time, limited or indefinite, as the Court may fix.

(2) Section 2(a) (15), (11 U.S.C. §11[a][15]), grants the Bankruptcy Court summary jurisdiction to make such orders, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the Bankruptcy Act.

(3) Section 70a(5), (11 U.S.C. §110[a][5]), vests

in the duly-appointed and qualified officer of the Court title to all of the Debtor's property which prior to the filing of the Petition the Debtor could by any means have transferred.

(4) Section 70b (11 U.S.C. §110[b]), authorizes the Bankruptcy Court to extend the time within which an executory contract must be assumed or rejected.

(5) Section 311 (11 U.S.C. §711), grants the Bankruptcy Court exclusive and summary jurisdiction over the Debtor and its property, wherever located

The jurisdiction of this Court to review the Order in question is based upon Sections 24, 25 and 316 of the Bankruptcy Act, (11 U.S.C. §§47, 48 & 716). The pleadings and facts disclosing the basis of the aforesaid jurisdiction are as follows:

(1) On October 19, 1966, Kendall Industries, Inc. filed its Petition for an Arrangement under Section 322 of Chapter XI of the Bankruptcy Act (11 U.S.C. §722) [R. 2-3].

(2) On October 19, 1966, the Referee in Bankruptcy entered his orders appointing A. J. Bumb as Receiver of Kendall Industries, Inc., enlarging the duties of the Receiver pursuant to General Order 40 of the General Orders in Bankruptcy and authorizing and directing the Receiver to

operate the business and manage the property of Kendall Industries, Inc. [R. 44].

(3) By letter dated October 24, 1966, the Pacific Telephone & Telegraph Company advised A. J. Bumb that unless the then billed and outstanding charges for telephone services rendered to the debtor prior to October 19, 1966 were paid by October 31, 1966, such telephone service would be disconnected [R. 51, line 14 - R. 52, line 13].

(4) On November 1, 1966, the Referee in Bankruptcy entered his "Order to Show Cause Why the Time to Accept or Reject Executory Contracts (Pacific Telephone & Telegraph Company) Should Not Be Extended, and Temporary Restraining Order" [R. 45-46] upon the Receiver's Application therefor [R. 47-49].

(5) On November 8, 1966, issue was joined by the filing of the "Response of the Pacific Telephone & Telegraph Company to Petition for Restraining Order" [R. 50-64] and on November 17, 1966 trial of the issues so raised was had before the Referee in Bankruptcy.

(6) On February 6, 1967, the Referee in Bankruptcy filed Findings of Fact and Conclusions of Law [R. 102-109] and, based thereon, filed his Order enjoining, until further order, the Pacific Telephone & Telegraph Company from disconnecting telephone service to the Receiver but directing the Receiver to pay all current charges for such telephone service [R. 110-111].

(7) On February 13, 1967, The Pacific Telephone & Telegraph Company filed its Petition for Review of said Order [R. 112-130].

(8) On March 6, 1967, the Referee filed his Certificate on Petition for Review [R. 131-137] and on May 1, 1967, the matter was heard by the District Judge who ruled that he would reverse the Referee in Bankruptcy and vacate the restraining order [Tr. No. 2, p. 21].[1/]

(9) On May 8, 1967, Findings of Fact and Conclusions of Law [R. 189-197] and a judgment [R. 198-199] were lodged with the District Court by Pacific Telephone & Telegraph Company, to which the Receiver filed Objections on May 15, 1967 [R. 200-235]. After hearing on said Objections, The Pacific Telephone & Telegraph Company lodged new Findings of Fact and Conclusions of Law [R. 236-241] and a Judgment [R. 242-244] with the District Court to which the Receiver filed Objections on June 2, 1967 [R. 248-284].

(10) After hearing on said Objections and on June 12, 1967, The Pacific Telephone & Telegraph Company lodged new Findings of Fact and Conclusions of Law [R. 285-289]

[1/] The transcript of the proceedings before the Referee in Bankruptcy on November 17, 1966, contained in this Court's Exhibit file, is referred to herein as "Tr. No. 1." The transcript of the proceedings before the District Court on May 1, May 22 and June 5, 1967, contained in this Court's transcript file, is referred to herein as "Tr. No. 2."

and a Judgment [R. 290-292], both of which were filed on June 28, 1967, the Judgment being entered on June 29, 1967.

(11) On July 14, 1967, the Receiver filed his Notice of Appeal from the Judgment of June 29, 1967 [R. 297].

STATEMENT OF THE CASE

On October 19, 1966, Kendall Industries, Inc. (hereinafter "Debtor"), filed a Petition under Chapter XI of the Bankruptcy Act (11 U.S.C. §§701-709), seeking to propose to its creditors a Plan of Arrangement to satisfy its obligations. On that date, A. J. Bumb was duly appointed and qualified as the Receiver for the Debtor [R. 2-3, 40-44].

Prior to the commencement of this proceeding on October 19, 1966, the Debtor operated heavy duty machine shops in Montebello, California and El Cajon, California, and a leasing company and hairpiece sales company in Los Angeles, California. Shortly after his appointment, the Receiver discontinued the operation of the hairpiece sales company, closed the El Cajon machine shop facility and removed all of the machinery, equipment and inventory located thereat to the machine shop facility in Montebello, California, where he continued the operation of this machine shop in accordance with the order of the Bankruptcy Court. The machine shop, which produces substantially all of the Debtor's income, fabricates

and manufactures, under sub-contracts, parts and equipment necessary to this country's space exploration program and national defense [R. 40-43, and 47, Tr. No. 1, pp. 11, 32].

Prior to the within proceeding, the Debtor subscribed to certain telephone service and The Pacific Telephone & Telegraph Company (hereinafter "Telephone Company"), installed all of the equipment necessary to render such service in the Debtor's place of business. At that time, the Telephone Company assigned to the Debtor certain telephone numbers, to wit, 723-6361, 728-7221, 685-7127, 723-3406, 685-7348 and 685-7545 [R. 48 and 51].[2/] These telephone numbers were listed by the Telephone Company as those of the Debtor in the various telephone directories which the Telephone Company publishes and causes to be distributed, including the so-called "Classified Directory." Upon the commencement of this proceeding, the Telephone Company advised the Receiver that if he failed to supersede to the numbers theretofore listed to the Debtor by making an arrangement satisfactory to the Telephone Company for the payment of all sums due it, the Telephone Company would discontinue service to the telephone

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[2/] Only the telephone numbers for the machine shop in Montebello, California are in issue. The telephone numbers for the El Cajon machine shop and the Los Angeles hair-piece sales company were disconnected shortly after the initiation of this proceeding at the Receiver's request when he terminated those operations.

numbers listed to the Debtor. The Receiver was further advised of a sum allegedly due from the Debtor to the Telephone Company and that if the Receiver did not wish to supersede, he could have new telephone numbers, but without referral service. In this latter event, the Receiver was advised, a customer or other person dealing with the Debtor who called the numbers theretofore listed to the Debtor would be told that those numbers had been disconnected [R. 48, 51, 52, 53, 103, 104, Tr. No. 1, p. 6].

The Telephone Company admitted:

(1) that the telephone service rendered to the Debtor at the aforedescribed numbers had not been disconnected prior to the initiation of the Chapter XI proceeding;

(2) that the service continued uninterrupted after filing of the Chapter XI Petition (and even before the restraining order was obtained);

(3) that all equipment necessary to render telephone service to the numbers listed to the Debtor was located on the Debtor's premises (with the exception of central office switching equipment and the like);

(4) that if the Receiver desired to continue that service without enlarging it, no further equipment need be installed at the Debtor's place of business;

(5) that in order to transfer such service to the Receiver, the Telephone Company would not have to change

any of its central office equipment or effectuate any change of switching facilities, provided that the service to be rendered remained the same as that rendered to the Debtor; and

(6) as to giving referral service should the Receiver desire a new telephone number, that there is no tariff, rule or regulation or rule of law that requires the Telephone Company to give or not to give referral service [R. 104, 105, Tr. No. 1, pp. 3-4].

Upon his appointment, the Receiver requested that the Telephone Company furnish to him bills for the amounts which it claimed were past due from the Debtor for telephone service and for directory advertising service, together with the normal supersedure forms employed by the Telephone Company so that the amounts claimed could be checked against the Debtor's records [Tr. no. 1, pp. 29-30]. The Telephone Company advised the Receiver that it required he pay the telephone bills and supersede to the telephone numbers utilized by the Debtor. Upon his failure so to do, the Receiver was advised service would be discontinued to the numbers theretofore used by and listed to the Debtor and calls made to any of those numbers would not be referred to any new telephone numbers obtained by the Receiver. The Receiver requested that service be continued to him on the telephone numbers theretofore listed to the Debtor and then being used by him until he could determine whether he would keep any of the said telephone numbers.

The Receiver offered to pay, as an expense of administration, the current operating and service charges due the Telephone Company for service on each and all of the said telephone numbers, but the Telephone Company refused this offer [R. 48, 52, 53, 103, 104, Appellee's Exhibit #1].

On October 24, 1966, when the Telephone Company wrote to the Receiver requesting that he supersede by payment of the past due bill, it advised the Receiver that the sum of $4,459.82 was due [Appellee's Exhibit #1]. The Telephone Company did not then, or at any subsequent time in this proceeding, claim to, nor does it hold security for its alleged claim upon any property of the Debtor [R. 105].

The operation of the Debtor's business by the Receiver required uninterrupted telephone service on its numbers as they existed prior to October 19, 1966, since those numbers were well known to all of the Debtor's customers, suppliers and other persons dealing with it. Further, the disconnection of said telephone numbers, without referral service, would adversely affect the Debtor's business and impede its successful rehabilitation since the major method by which the Debtor conducted its business was over the telephone, utilizing the numbers assigned to it by the Telephone Company prior to October 19, 1966 [R. 105, Tr. No. 1, pp. 11, 31-32].

STATUTES INVOLVED

The statutes involved herein are §§2(a) (15), 70a(5), 70b, 311, 343 and 351 of the Bankruptcy Act [11 U. S. C. §§11(a) (15), 110a(5), 110b, 711, 743 and 751]. These sections are set forth in Appendix A.

INTRODUCTORY ARGUMENT

There is a vital property interest in a telephone number held by a going business concern.

The Debtor was in possession of its telephone numbers and the associated telephone service when this proceeding was initiated and that service had not been disconnected prior to the initiation of this proceeding.

The Telephone Company's tariffs which seek to define what is and what is not "property" are unreasonable, comprise contracts by adhesion and are in conflict with the policy and provisions of the Bankruptcy Act.

The Bankruptcy Court cannot surrender the Congressional grant of jurisdiction over the affairs of the Debtor, including the right to determine and adjudicate creditor claims, to the Telephone Company an unsecured creditor, or to the Public Utilities Commission of the State of California.

The questionable ruling of the Court of Appeals for the Second Circuit in Slenderella is not binding upon this Court, not only because it has not been considered by this Court, but also because it conflicts with the reasoning of the United States Supreme Court, the Court of Appeals for the Seventh Circuit and controlling decisions under California law. Moreover, the rule for which the Telephone Company contends would permit it to obtain preferential treatment in every bankruptcy case where a trustee, receiver or debtor continues to operate the business of the bankrupt-debtor, all in violation of the spirit and purpose of the Bankruptcy Act.

For these reasons, the Referee in Bankruptcy had summary jurisdiction to enter the Order of February 6, 1967, and its reversal by the District Court was error.

The District Court also erred in rejecting some of the Referee's Findings of Fact and in modifying others since all of the Referee's Findings of Fact are substantiated by the evidence and the stipulations of the parties.

SUMMARY OF ARGUMENT

I

The decision of the Court of Appeals for the Second Circuit in the case of Slenderella Systems of Berkeley v. Pacific Telephone and Telegraph Co., 286 F. 2d 488 (C. A. 2,

1961), was wrong when decided, is not binding on this court and no longer reflects the law as to "property" for jurisdictional purposes in bankruptcy.

II

A telephone number and associated services are "property" within the meaning of the Bankruptcy Act.

III

The tariffs of the Pacific Telephone and Telegraph Company which seek to define what is and what is not "property" and which seek to establish a procedure for supersedure are self-serving, unreasonable, comprise contracts by adhesion, would afford the Telephone Company preferential treatment over other creditors of the same class, conflict with the policies and provisions of the Bankruptcy Act and are not binding upon the Bankruptcy Court in determining whether a telephone number and its associated service are "property" within the meaning of the Bankruptcy Act.

IV

The Bankruptcy Court has exclusive jurisdiction to classify creditor claims and to determine and adjudicate the nature and amount thereof, which jurisdiction cannot be usurped by a creditor or an administrative agency of the State of California.

V

The Injunction sought by the Receiver relates to and arises from a matter of administration and, as such, is within the exclusive and summary jurisdiction of the Bankruptcy Court.

VI

The Referee in Bankruptcy correctly decided the question in his Findings of Fact, which Findings of Fact are not clearly erroneous, and the District Court, on review, was without authority to disturb said Findings of Fact or the inferences drawn by the Referee in Bankruptcy from admitted facts.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN SLENDERELLA WAS WRONG WHEN DECIDED, IS NOT BINDING ON THIS COURT AND NO LONGER REFLECTS THE LAW AS TO "PROPERTY" FOR JURISDICTIONAL PURPOSES IN BANKRUPTCY.

The Telephone Company relies upon Slenderella Systems of Berkeley v. Pacific Telephone and Telegraph Co., 286 F. 2d 488 (C. A. 2, 1961) for the proposition that there is no property right in a telephone number and that the Bankruptcy Court, therefore, cannot have summary jurisdiction based upon

possession at the time of the filing of a Petition. This case was wrong as decided, and was never properly the law in California. Further, the decision in Segal v. Rochelle, 382 U.S. 375, 86 S. Ct. 511 (1966), invalidates Slenderella's too restrictive rendering of the term "property."

As in Slenderella, the Telephone Company relies on its Rule 17(D) (Schedule Cal. P.U.C. No. 36-T, 2nd Revised Sheet 63) which provides that "the subscriber has no proprietary right in the number." The same regulatory provision was involved in Slenderella. But the Second Circuit was interpreting California law without the benefit of California law. In Orloff v. Los Angeles Turf Club, 30 Cal. 2d 110, 180 P. 2d 321 (1947), the Court, quoting from Walsh on Equity, said:

> "It is clear that equity protects many rights of a personal character whenever they are rights of substance, often classifying them as property rights in order to bring them within the earlier cases holding that equity will protect property rights only. Business rights of all kinds discussed in the preceding Chapter are not property in the legal sense. Nevertheless, they are valuable rights of economic value, and the reasons for protecting them are identical with the reasons for protecting rights in lands or chattels."

It is clear, therefore, that the Supreme Court of California does not regard "property" in a legalistic sense. It considers any important business right which has a substantive value to the business as "property." This, of course, is the attitude taken by the Supreme Court of the United States in the Segal case, supra. The Court there stated (382 U.S. 377 at 379):

> "The main thrust of Section 70a (5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end, the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." [Citations omitted].

In Segal, supra, the Court was considering a contingent tax refund in which there was, of course, no "proprietary" interest at the time. It would be wrong to assume that the States by their statutes or regulatory rules can make and unmake "property" to bring it within or without the bankruptcy jurisdiction. This would thwart the purposes and intent of the Bankruptcy Act, which leaves it to the Bankruptcy Court itself, apart from State law, to determine the meaning of "property" within the purposes of the Bankruptcy Act.

In Board of Trade v. Weston, 243 F. 332 (C. A. 7, 1917), the Court said, at page 335:

> " . . . it would be strange if the dominant grant to Congress to legislate upon bankruptcy and insolvency, and which, when exercised, supersedes state legislation respecting these matters, should nevertheless be subordinate to the right of each State to determine what is or shall be property subject to the terms of the Bankruptcy Act."

The logic of this observation appears also in the cases of Board of Trade of City of Chicago v. Johnson, 264 U. S. 1, 44 S. Ct. 232 (1924) and Garber v. The Bankers' Mortgage Co., 27 F. 2d 609 (D. C. Kan., 1928). While it is normally true that the ownership of property ordinarily depends upon state law, 4 Collier on Bankruptcy, page 1034 (14th ed.), states, "It is clear, of course, that in the event of any conflict between the State law and the Bankruptcy Act, the State law must yield."

In the case of Barutha v. Prentice, 189 F. 2d 29 (C. A. 7, 1951), the Court was dealing with the language of a Wisconsin statute which held that no certificate or license issued thereunder should be construed to be irrevocable or to confer any property right on the holder thereof. The Court said, at page 30:

"The obvious purpose of the legislature . . . was to prevent the holder of such a license from raising a constitutional question as to his property rights in the license in the event it became necessary in the proper administration of the Act for the Commission to revoke the license or to refuse to approve a transfer thereof. . . . A recent case decided by this court, In re Rainbo Express, 7 Cir., 179 F. 2d 1, 5, held that a certificate of public convenience and necessity issued by the Interstate Commerce Commission was 'endowed with a proprietary interest capable of transfer.' . . . the trustee there insisted that such a certificate was not personal property which could be effectively mortgaged 'since it is a mere license or permit, personal in nature and transferrable only pursuant to such rules and regulations'; and that 'prior to approval by the Commission, there is no proprietary interest in the certificate holder to which a lien may attach.'

"After carefully reviewing and considering the conflicting decisions on the subject, this court said, 179 F. 2d at page 5: 'Upon reason and authority we think it clear that such a certificate is endowed with a proprietary interest capable

of transfer. . . .'"

The Court then likened this to the Board of Trade membership and concluded, at page 31:

> "The record indicates that the operating rights under this license were of considerable value. Whether such operating rights be called 'property' or an 'asset,' or something else, we see no valid reason why such operating rights should not be considered and treated as part of the bankrupt estate and be sold by the trustee, subject to the approval of the Public Service Commission, for the benefit of the creditors."

The Bankruptcy Court has an interest in protecting the operations of the Debtor in order to preserve the value of the property in custodia legis for the benefit of all the creditors and, in proceedings under the rehabilitative provisions of the Bankruptcy Act, as here, for the rehabilitated Debtor. The value of a going business depends upon goodwill and, in this modern day, ease of communication. Protection of property rights, therefore, must have the business meaning indicated in the Orloff case, (and in the bankruptcy cases cited above), and not the narrow construction of "proprietary" rights given it in the Slenderella case. The time has come to depart from the self-defeating concept of the Slenderella case that property can be removed from the

jurisdiction of the Bankruptcy Court by some regulatory rule which arbitrarily defines it as non-property.

Notwithstanding the rules of the Public Utilities Commission, it is clear to all that the Telephone Company cannot deal arbitrarily with the numbers it assigns its subscribers, and that a court of equity would and should restrain such arbitrary dealings where the retention of a number is a vital element in preserving the sale value of a business or its operation, as it is in this case. It would be shocking indeed if the Public Utilities Commission were permitted to negative the Bankruptcy Court's jurisdiction over a valuable asset of this estate. The substantial value of the Debtor's telephone numbers, in that they are essential to the continued operation of the Debtor's business, is clear [R. 105, Tr. No. 1, p. 11]. Further, that a particular telephone number is intrinsically valuable was conceded by counsel for the Telephone Company at the hearing before the Referee in Bankruptcy [Tr. No. 1, pp. 5-6] and was also established at that hearing by testimony introduced in behalf of Appellant [Tr. No. 1, pp. 7-8, 12-14].

II

A TELEPHONE NUMBER AND ASSOCIATED SERVICES ARE "PROPERTY" WITHIN THE MEANING OF THE BANKRUPTCY ACT.

Section 70a (5) of the Bankruptcy Act [11 U. S. C. §110a (5)] provides that the trustee of the estate of a bankrupt

shall be vested with the title of the bankrupt to any "... property, ... which prior to the filing of the petition he could by any means have transferred ..." The Telephone Company's Rule 23(B) (SCHEDULE CAL. P.U.C. NO. 36-T, Third Revised Sheet 72) [R. 63], provides that a new subscriber may take over the telephone services rendered to a discontinuing subscriber on the premises where that service is being rendered if a written notice to that effect from both parties is presented to the Telephone Company and where the new subscriber agrees to pay all of the obligations of the out-going subscriber. The effect of this rule is to permit a subscriber to transfer his telephone number to another subscriber, on the same premises, with the consent of the Telephone Company, which consent, presumably, will be rendered if the intended assignee agrees to pay all of his assignor's obligations to the Telephone Company. Thus, as shown by the Record, a particular number is an asset and is transferrable, albeit with the consent of the Telephone Company [R. 286]. It is difficult to see, therefore, how the Telephone Company can claim that the telephone service and number listed to the Debtor is not property even in the strict legalistic sense merely because the Telephone Company has promulgated a Rule saying so [Rule 17(D), SCHEDULE CAL. P.U. C. NO. 36-T, Second Revised Sheet 63, R. 62], since the Telephone Company by its Rule 23(B), supra, makes the service and telephone number

assignable; and the right to assign, even if conditioned, has long been an incident of "property."

The cases cited hereinabove require, by analogy, that the telephone numbers and service rendered to the Debtor by the Telephone Company be termed "property." For example, in Board of Trade of City of Chicago v. Johnson, 264 U.S. 1 (1924), the United States Supreme Court held that a membership in the Commodity Exchange was "property" which passed to the trustee in bankruptcy under the provisions of §70a (5) of the Bankruptcy Act [11 U.S.C 110a (5)]. That case, together with Board of Trade v. Weston, 243 F. 332 (C.A. 7, 1917), which reached the same conclusion, dealt with a membership in the Chicago Commodities Exchange, the rules of which are surprisingly similar to the Telephone Company's tariffs herein. Those rules provide that the member could transfer his membership only upon the approval of the Board and such approval was, by the rules of the Board, predicated on good standing and the payment of all past due obligations. The Telephone Company's tariff governing supersedure [Rule 23(B)] likewise permits the transfer of a telephone number from a discontinuing subscriber to another party, subject to the Telephone Company's approval and the payment of all unpaid charges. The restriction on transferability was held, in the Weston case, only to " ... affect the value of a seat in a Stock Board, not its existence as property." (243 F. 332, 336).

(Emphasis supplied.)

The United States Supreme Court reached the same conclusion in the Johnson case, supra. It is difficult to see how a contrary conclusion could be reached in the instant case, since we are dealing with a similar, intangible right. In the Commodity Exchange cases, the right concerned the use of the facilities of the Exchanges. In the instant case, the right concerns the facilities provided by the Telephone Company and the telephone number assigned to those facilities and listed to the Debtor.

In the Johnson case, supra, the Supreme Court held that the definition of "property," as used in §70a(5) of the Bankruptcy Act [11 U.S.C. §110a (5)], was not to be limited by the interpretation placed on the term "property" by state law, saying that when ". . . the language of Congress indicates a policy of broader construction of the statute [the Bankruptcy Act] than the State decisions would give it, Federal Courts cannot be concluded by them" (264 U.S. 1, 10). This Supreme Court ruling, together with its ruling in Segal v. Rochelle, supra, clearly establishes the fallacy of the Telephone Company's assertion that because its tariffs say that a telephone number is not "property" there was never any "property" in the actual or constructive possession of the Debtor which passed into the possession and control of the Bankruptcy Court upon the filing of the within proceeding.

The Segal case, supra, is particularly significant since, in interpreting the word "transfer" the Court concluded that, if the transferee's interest would be protected by a court of equity, a transfer satisfying §70a (5) [11 U.S.C. §110a (5)] was accomplished, even though the transfer would not be recognized by a court of law. On this point, Justice Harlan said (382 U.S. 375, 385):

> "Yet it remains true that a Texas court of equity could and would compel the assignment of any refund received, if indeed it might not try to compel a reluctant assignor to collect the claim or make it over by a valid assignment when that became possible. This, we believe, suffices to make the Segals' claims transferable within the meaning of §70a (5)."

As appears from the Orloff case, supra, the California courts recognize business rights of all kinds as possessing value and entitled to the protection of a court of equity. Since a California court of equity, therefore, would protect a telephone number transferred to an assignee in compliance with the Telephone Company's Rule 23(B) against any arbitrary attempt by the Telephone Company to abrogate that assignment, then, under Segal, the telephone number is both "property" and capable of "transfer" under §70a (5) of the

Bankruptcy Act [11 U.S.C. §110a (5)].

Considering the foregoing trend exhibited by the modern cases in broadening the concept of "property" to include various forms of intangibles, the Slenderella case relied upon by the Telephone Company represents a decision wholly without logic in its concept of basic values. No effect was given by the rendering Court in that case to the concept that a telephone number and telephone service are, in today's world of business, a valuable asset. This fact was established by the Receiver's testimony and was not controverted by the Telephone Company [Tr. No. 1, pp. 11-14]. Viewed in these circumstances, the relief sought by the Receiver is neither startling nor a departure from the existing law at all. Nor should this court abdicate its function of augmenting and contributing to the dynamic expansion of the law by refusing to reconsider an unsatisfactory court-made rule, such as that espoused in Slenderella. As was said by Mr. Justice Desmond of the Court of Appeals of the State of New York in Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951):

> "Our Court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it (Rumsay v. New York and N.E.R.R. Co., 133 N.Y. 79, 85, 86, 303 N.E. 654, 655, and see Klein v. Maravelas, 219 N.Y. 383,

114 N. E. 809). That opinion notes that Chancellor Kent, more than a century ago, had stated that upwards of a thousand cases could then be pointed out in the English and American Reports 'which had been overruled, doubted or limited in their application' and that the Great Chancellor had declared that decisions which seem contrary to reason 'ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' And Justice Sutherland, writing for the Supreme Court in Funk v. United States (290 U. S. 371, 382, 54 S. Ct. 212, 215, 78 L. Ed. 369), said that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the Court to bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.' "

III

THE TARIFFS OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY WHICH SEEK TO DEFINE WHAT IS AND WHAT IS NOT "PROPERTY" AND WHICH SEEK TO ESTABLISH A PROCEDURE FOR SUPERSEDURE ARE SELF-SERVING, UNREASONABLE, COMPRISE CONTRACTS BY ADHESION, WOULD AFFORD THE TELEPHONE COMPANY PREFERENTIAL TREATMENT OVER OTHER CREDITORS OF THE SAME CLASS, CONFLICT WITH THE POLICIES AND PROVISIONS OF THE BANKRUPTCY ACT AND ARE NOT BINDING UPON THE BANKRUPTCY COURT IN DETERMINING WHETHER A TELEPHONE NUMBER AND ITS ASSOCIATED SERVICE ARE "PROPERTY" WITHIN THE MEANING OF THE BANKRUPTCY ACT.

Assuming, arguendo, that the Telephone Company's tariffs form a part of its contract with the subscriber, which the Receiver does not admit, an examination of the circumstances surrounding their promulgation, the acceptance by any subscriber of the contract and the only method available to any subscriber to attack these tariffs and the contract clearly demonstrate that the Telephone Company has placed itself in a superior, if not supreme bargaining position.

To oppose the Telephone Company's promulgation of a tariff or to seek to have a tariff modified or rescinded, a subscriber must resort either to an action in the courts or an administrative proceeding before the Public Utilities Commission of the State of California. Either course of

action is, obviously, too demanding for the ordinary subscriber who does not anticipate the dire consequences of his failure to so object. Further, what choice does the ordinary subscriber have? If he wishes to have telephone service at all, he must accept the contract proposed by the Telephone Company, for there is no other telephone company with which he can deal. The California Courts have long recognized such a situation as presenting a contract by adhesion. Thus, in Gray v. Zurich Insurance Company, 65 Cal. 2d 263, 269, 419 Pac. 2d 168 (1966), the California Supreme Court said:

> ". . . a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it' basis carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties." See also Stevens v. Fidelity and Casualty Co., 58 Cal. 2d 862, 377 Pac. 2d 284 (1962); Tunkl v. Regents of University of

California, 60 Cal. 2d 92, 383 Pac. 2d 441 (1963); 6 A. L. R. 2d 693; Neal v. State Farm Insurance Co., 188 Cal. App. 2d 690, 10 Cal. Rptr. 781 (1961); Lagomarsino v. San Jose Title Insurance Co., 178 Cal. App. 2d 455, 3 Cal. Rptr. 80 (1960).

The doctrine of "contract by adhesion" requires that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the weaker party would reasonably or legitimately expect by way of services according to the enterpriser's "calling," and to what extent the stronger party disappointed reasonable expectations based on the typical life situation. See Kessler, Contracts of Adhesion, 43 Columbia Law Review 629 (1943); Patterson, The Interpretation and Construction of Contracts, 64 Columbia Law Review 833 (1964).

When a subscriber seeks telephone service, there is not exhibited to him any of the tariffs pursuant to which the Telephone Company operates. Instead, at best, when he receives his monthly bill, he will find on the back of it, if he is curious enough to read the back of his bill, a statement advising when the bill is due and payable, that service may be discontinued if it is not paid and the procedure for contesting the amount set forth in the bill. There is not even a statement to the effect that telephone service is rendered

pursuant to tariffs on file with the Public Utilities Commission to which resort must be had if the subscriber wishes to learn the terms of these tariffs. Is this what the reasonable man would expect when he enters into an agreement with the company which is given a monopoly in its field of operation ?

In any event, it is inherent from the Telephone Company's position that what the reasonable may may expect is not important. What is important is what the Telephone Company wants [Tr. No. 1, pp. 4-7, 35-36 and 40-41]. The reasonable man would expect that when he obtains a telephone, that telephone number is his to use as he sees fit in the establishment and conduct of his business. He can also reasonably expect that as his customers become acquainted with his telephone number they will expect to be able to reach him at that telephone number and that, over the years, that telephone number will acquire value and become an asset of his business. And, if the number must be changed, he expects that there will be a referral service so that he does not disappear.

However, if we give full effect to the position advanced by the Telephone Company, that reasonable expectation is to be denied. The effect of this position in the light of today's business demands for ready, easy and sure communication between parties is not only to destroy that which may comprise

the major asset of a business but also to disregard the "reasonable layman" doctrine enunciated by the California Courts. See Stevens v. Fidelity and Casualty Co., supra, ; Ransom v. Penn Mutual Life Insurance Co., 43 Cal. 2d 420, 274 Pac. 2d 633 (1954). Further, recognition of the Telephone Company's position denies the implied covenant in all contracts that the parties will act in good faith. See Milton v. Hudson Sales Corp., 152 Cal. App. 2d 418, 313 Pac. 2d 936 (1957).

To give effect to the Telephone Company's tariffs and require the Receiver to make the payment demanded by the Telephone Company would not only defeat the "reasonable layman" and "reasonable expectations" tests enunciated above, but would permit the Telephone Company to receive that which the Bankruptcy Act abhors most; preferential treatment by receiving a greater percentage of its claim than all of the other creditors of the same class. As noted previously, the Telephone Company does not lay claim to any security for its claim and has admitted that it is an unsecured creditor. The testimony below establishes [Tr. No. 1, p. 31] as does the record [R. 105 and 106] that in the event of an adjudication the unsecured creditors would receive substantially less than 100 cents on the dollar in satisfaction of their claims. To permit such a self-serving and inequitable result to obtain because of the Telephone Company's superior bargaining position flies in the face of reason and good

conscience.

To permit, therefore, this "contract by adhesion" to be determinative of what is or is not "property" for purposes of determining what is the jurisdiction of the Bankruptcy Court is in violation of the basic policies and provisions of the Bankruptcy Act. That such tariffs are not binding upon the Bankruptcy Court is clear from the unambiguous ruling of the Supreme Court in Board of Trade of City of Chicago v. Johnson, 264 U.S. 1, 44 S. Ct. 232 (1924) wherein it was held that the Fdederal Courts cannot be concluded by narrow language in state laws or state court decisions when Congress has indicated a policy of broad construction of a statute, such as is the case in the Bankruptcy Act. Further, effect must be given to the undisputed evidence that the "property" was in the possession of the Debtor when the within proceeding was filed and continued in the possession of the Receiver even before the Referee in Bankruptcy issued his Restraining Order on November 1, 1966 [R. 104]. Since the telephone number and the associated telephone service is in every sense of the word "property" and is capable of "transfer" within the meaning of §70a (5) of the Bankruptcy Act [11 U.S.C. §110a (5)], it passed into the jurisdiction of the Bankruptcy Court upon the filing of the within proceeding. As was said in the Johnson case, supra, :

"The membership is property in a way attached to the person of the bankrupt and disposable only by his will. It follows him, therefore, into the Bankruptcy Court, which is given full equitable jurisdiction over his conduct in respect of his estate, and therefore comes into the custody of that Court to be administered by it as part of his estate.

"The Board is not in an adverse attitude toward the bankrupt. It holds the membership for the bankrupt in conformity to the rules as to his enjoyment and disposition of it ... and that in Bankruptcy ... it ... passes into the control, and therefore into the possession of the Trustee" (264 U.S. 1, 12 and 13).

For these reasons, there is no doubt but that a telephone number is "property" and it being in the possession of the Debtor at the inception of this proceeding, passed into the jurisdiction of the Bankruptcy Court without being affected by the self-serving restraint sought to be imposed thereon by the Telephone Company's tariffs.

IV

THE BANKRUPTCY COURT HAS EXCLUSIVE JURISDICTION TO CLASSIFY CREDITOR CLAIMS AND TO DETERMINE AND ADJUDICATE THE NATURE AND AMOUNT THEREOF, WHICH JURISDICTION CANNOT BE USURPED BY A CREDITOR OR AN ADMINISTRATIVE AGENCY OF THE STATE OF CALIFORNIA.

The Receiver relies, in addition to §70a (5) of the Bankruptcy Act as noted hereinabove [11 U.S.C. §110a (5)], upon §311 of the Bankruptcy Act (11 U.S.C. §711), which provides that the Chapter XI Court has exclusive jurisdiction of the Debtor and his property, wherever located. This Section is derived from former §§74(m) and 77(B)(a) of the Bankruptcy Act [11 U.S.C. former §§202(m) and 207(a)], 8 Collier on Bankruptcy, page 176, footnote 1 (14th ed.). The same provision is contained in §111 of Chapter X and §411 of Chapter XII of the Bankruptcy Act (11 U.S.C. §§511 and 811, respectively). It therefore follows that the interpretation placed upon these sections by the Courts are likewise applicable to §311 of Chapter XI (11 U.S.C. §711).

Chapter XI of the Bankruptcy Act (11 U.S.C. §§701-799) provides an integrated system for the rehabilitation of a financially distressed business, such as the Debtor. Under the supervision of the Bankruptcy Court, the interests of the various creditors are adjusted and reconciled with the

preservation of the enterprise as a going concern. To accomplish this result, the Chapter XI Court is granted broad powers. Included among these powers is the grant of jurisdiction set forth in §311 of the Bankruptcy Act (11 U.S.C. §711). In addition, the Bankruptcy Court is granted the power to stay or enjoin other proceedings (§314, 11 U.S.C. §714), to fix the division of creditors into classes and to determine any controversy between them (§351, 11 U.S.C. §751) as well as the right to inquire into the validity of an alleged debt or obligation of the debtor. Lesser v. Gray, 236 U.S. 70, 35 S.Ct. 227 (1914). See also U.S. Fidelity and Guarantee Co. v. Bray, 225 U.S. 205, 32 S.Ct. 620 (1911). Consequently, the Bankruptcy Court has exclusive jurisdiction over the administration of the Estate and is not at liberty to surrender it. Mangus v. Miller, 317 U.S. 178, 63 S.Ct. 182 (1942); U.S. Fidelity and Guarantee Co. v. Bray, supra. See also In re Fine Arts Corporation, 136 F.2d 28 (C.A. 6, 1943); In re Terrace Lawn Memorial Gardens, 256 F.2d 398 (C.A.9, 1958).

As noted previously, the telephone service and numbers in question are "property" of the Debtor, both in the equity and bankruptcy sense and in the strict legalistic sense. Consequently, the Bankruptcy Court, under §311 of Chapter XI (11 U.S.C. §711), had jurisdiction over the subject matter of this controversy. Essentially, the controversy is one which centers around the payment of the sums claimed by the Telephone Company. The

effect of the Telephone Company's procedure for supersedure is that it is seeking to deprive the Bankruptcy Court of the Congressional grant of authority to adjudicate the claims of creditors, including that of the Telephone Company.

This follows from the Telephone Company's Rule 23 (B), supra, which seeks to compel the Receiver to pay the Telephone Company's unsecured claim in full before the Telephone Company will continue the telephone service heretofore rendered the Debtor or permit the Receiver to supersede [3/]. The gravamen of this attempt lies not so much in the amount sought to be collected, which, parenthetically, could seriously impede and interfere with the Receiver's continued operation of this business, as it does with the fact that the Receiver is prevented from contesting both the validity and the amount of the Telephone Company's claim and in bringing that controversy before the Bankruptcy Court. This result follows from the Telephone Company's Rule 11 (A) 4 (Schedule Cal. P.U.C. No. 36-T, 2d Revised Sheet 50) [R. 60], which provides:

> "In case of a dispute between subscriber and the Company as to the correct amount of a bill . . .

[3/] Nor will the Telephone Company give referral service to the Receiver unless the alleged past due bill is paid in full, since otherwise, the Telephone Company claims, its procedure for supersedure would be circumvented and it would be relegated to the same position as the other unsecured creditors (Tr. No. 2, pp. 52-53).

> which cannot be adjusted with mutual satisfaction, the subscriber may deposit with the Public Utilities Commission of the State of California . . . the amount claimed by the Company to be due . . . . Failure on the part of the subscriber to make such deposit . . . within 15 days after notice by the Company that such deposit must be made or service may be discontinued, shall warrant the Company in discontinuing the service without further notice."

Note that when, on October 24, 1966, the Telephone Company advised the Receiver of the amount claimed by the Telephone Company [Appellee's Exhibit #1], the amount stated as due and owing was $4,459.82. When, on November 8, 1966, the Telephone Company filed its response to the Receiver's Application for a Temporary Restraining Order, it stated the amount to be due and owing as $3,980.36 [R. 51]. Yet by adding up the figures set forth in the Telephone Company's said Response [Paragraph IV, R. 51] only the amount of $2,006.80 appears to be due and owing despite the fact that that same paragraph claims the sum of $3,980.36. At no time during the proceedings below did the Telephone Company waver in its claim for the sum of $3,980.36 as is clear from its Findings of Fact lodged on May 8, 1967 (Finding of Fact #9)

[R. 194], its Findings of Fact lodged on May 26, 1967 (Finding of Fact B) [R. 237]. See also Tr. No. 2, pp. 26 & 47.

The unreasonableness of this situation is clear. The Telephone Company's Exhibit 1 claiming $4,459.82 was prepared and presumably mailed to the Receiver on October 24, 1966, just five days after the Receiver had been appointed. That letter demanded that the Receiver pay $4,459.02 to the Telephone Company on or before October 31, 1966, else the telephone service would be disconnected. This is hardly a reasonable period of time for the Receiver to check this particular bill through the Debtor's records, considering the size of the Debtor's operation, the state of its records, the fact that it was unable to file with its Chapter XI Petition its Schedules listing its assets and liabilities [R. 3] but could only file a hand-written list of creditors therewith [R. 8-39] in which the Telephone Company appears in different places and for varying amounts.

Note also that the Telephone Company's letter of October 24, 1966 [Exhibit 1] flatly stated that if the amount claimed therein were not paid by October 31, 1966, telephone service would be disconnected. Nor did that letter advise the Receiver of his right to dispute the amount of the bill as provided for in the Telephone Company's Rule 11(A) 4 [R. 60]. Had that option been made known to the Receiver,

by the Telephone Company, it is apparent that no amicable adjustment thereof could have been effected without a deposit with the Public Utilities Commission of the State of California of the amount claimed in the Telephone Company's Exhibit 1. Any disposition of the dispute would then have been subject, time-wise, to whatever calendar or other problems with which the Public Utilities Commission of the State of California may then have been confronted. Nor is it clear from the Telephone Company's said Rule 11(A) 4 whether a hearing would have been afforded the Receiver. Thus does the Telephone Company seek to oust the Bankruptcy Court from its jurisdiction over the rehabilitation of the Debtor and the determination of the class into which the Telephone Company would be placed as well as the validity and amount of its claim.

A similar situation was presented in In the Matter of Muskegon Motor Specialists International Union, etc., v. Davis, Trustee of Muskegon Motors, 313 F. 2d 841 (C.A. 6, 1963), Cert. denied, International Union United Auto., etc., AFL-CIO v. Davis, 375 U.S. 832 (1963). There, the Union claimed vacation pay for employees for a stated period. It claimed that although the division of the employer had closed its plant and had no employees as of the date of determining seniority or for vacation pay purposes, the employer should nevertheless pay for the vacations to which the employees would have been entitled had the employer remained in business. Upon refusal

of the employer to accede to this demand, the Union demanded arbitration and thereafter filed suit in the District Court to compel arbitration. Subsequently, the employer filed a Petition under Chapter XI of the Bankruptcy Act which was thereafter amended to comply with Chapter X of the Bankruptcy Act. The Trustee was added as a party defendant and also filed a petition for an order rejecting the executory provisions of the collective bargaining agreement. The District Court refused to surrender its jurisdiction to arbitration. The Court of Appeals affirmed, holding that §111 of Chapter X of the Bankruptcy Act (11 U.S.C. §511), which is identical to §311 of Chapter XI of the Bankruptcy Act (11 U.S.C. §711), conferred exclusive jurisdiction upon the Bankruptcy Court to determine and adjudicate the proof and allowance of claims as well as the validity and amount thereof. It found further, that the District Court did not abuse its discretion in refusing to surrender jurisdiction in favor of arbitration since the res was in custodia legis. The precise situation obtains in the instant case since both the telephone service and telephone numbers are and have been in the possession of the Bankruptcy Court since the inception of the within proceeding and, since the date of his appointment, in the possession of the Receiver.

V

THE INJUNCTION SOUGHT BY THE RECEIVER RELATES TO AND ARISES FROM A MATTER OF ADMINISTRATION AND, AS SUCH, IS WITHIN THE EXCLUSIVE AND SUMMARY JURISDICTION OF THE BANKRUPTCY COURT.

The Bankruptcy Court has exclusive and summary jurisdiction with respect to all proceedings in bankruptcy in the course of administration of the estate. As stated in 2 Collier On Bankruptcy page 450 (14th Edition):

> "With respect to all proceedings in bankruptcy in the course of administration the Bankruptcy Court may act summarily and in that manner determine the rights of the parties affected."

And, as noted previously, once that jurisdiction vests in the Bankruptcy Court, it may not be surrendered. See Mangus v. Miller, supra, U. S. Fidelity and Guarantee Co. v. Bray, supra, In re Fine Arts Corporation, supra, and In re Terrace Lawn Memorial Gardens, supra. Section 343 of the Bankruptcy Act (11 U.S.C. §743) authorizes the conduct of a Debtor's business for such time, limited or indefinite, as the Court may fix. The Order appointing the Receiver directed him to operate the business of the within estate [R. 40-46] and enlarged his duties pursuant to General Order 40 of the General Orders In Bankruptcy. Section 70(b) of the Bankruptcy Act (11 U.S.C.

§110b) authorizes the assumption or rejection of executory contracts within the periods therein stated and further authorizes the Court, for cause shown, to extend or reduce the time for such acceptance or rejection. Section 2(a)(15) of the Bankruptcy Act (11 U.S.C. §11[a][15]) authorizes the Bankruptcy Court to make such Orders, in addition to those specifically provided for, as are required to enforce the provisions of the Bankruptcy Act.

It appears then that the Receiver was confronted with a direction of the Bankruptcy Court to operate the Debtor's business; that he was almost immediately confronted with the demand from an alleged creditor for the payment of a large sum of money or the telephone service necessary to the operation of that business would be disconnected. Clearly, what was involved was a determination whether to assume or reject an executory contract and under what circumstances. Such contract clearly grew out of and was an administrative matter, since it related to an obligation sought to be imposed upon the Debtor and the Receiver in conjunction with the operation of the business of the Debtor and in no way sought to alter the legal relationship between the parties. The Receiver, confronted with an arbitrary demand, an arbitrary time limit and voluminous records to wade through in order to determine the correctness of that demand, sought and seeks only to have the time imposed by that demand and by §70b of the Bankruptcy Act

(11 U.S.C. §110b) extended. Surely, as a matter of administration, the Receiver's Application and the Bankruptcy Court's Order To Show Cause and Temporary Restraining Order fall within the Congressional grant of authority contained in §2(a)(15) of the Bankruptcy Act (11 U.S.C. §7[a][15]) in furtherance of the purposes expressed in §70b of the Bankruptcy Act (11 U.S.C. §110b). The jurisdiction and power thus granted the Bankruptcy Court by Congress was and is sufficient to sustain the Order made by the Referee In Bankruptcy on February 6, 1967.

VI

THE REFEREE IN BANKRUPTCY CORRECTLY DECIDED THE QUESTION IN HIS FINDINGS OF FACT, WHICH FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS, AND THE DISTRICT COURT, ON REVIEW, WAS WITHOUT AUTHORITY TO DISTURB SAID FINDINGS OF FACT OR THE INFERENCES DRAWN BY THE REFEREE IN BANKRUPTCY FROM ADMITTED FACTS.

In the Findings of Fact filed by the District Court on June 28, 1967 [R. 285-287,] the District Judge accepted the Referee's Findings of Fact for the most part, but rejected, in whole or in part, four of those Findings of Fact and modified another Finding of Fact. The Referee's Findings of Fact thus affected are No. 4, No. 6, No. 20, No. 23 (although in the District Court's Findings of Fact this is denominated as Referee's Findings of Fact No. 21) and No. 24. These Findings

of Fact are set forth verbatim in Appendix B. However, the District Court did not take testimony, did not observe the demeanor of the witnesses who testified before the Referee in Bankruptcy and had no basis for concluding that the Referee's Findings of Fact were clearly erroneous [Tr. No. 2, pp. 25-26] .

The Referee's Findings of Fact are all substantiated by the evidence presented below. As to the Referee's Finding of Fact No. 4, see Transcript No. 1, pages 11 through 14 and 16; as to the Referee's Finding of Fact No. 6, see Receiver's Application for Extension of Time, paragraph 4 [R. 48-49] as to which there is no denial contained in the Telephone Company's Answer; as to the Referee's Finding of Fact No. 20, the Telephone Company's Rule 11(A) is set forth from which the Referee inferred that to give effect thereto would be to deprive the Bankruptcy Court of its jurisdiction to adjudicate claims; as to the Referee's Finding of Fact No. 23, see Transcript No. 1, pp. 15-17; and as to Referee's Finding of Fact No. 24, see Transcript No. 1, pp. 12, 16-17 and 31.

General Order No. 47 of the General Orders In Bankruptcy provides:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge

shall accept his findings of fact unless clearly erroneous. The judge at the hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

It is noted that at the hearing before the Referee in Bankruptcy counsel for the Telephone Company introduced no evidence to refute the testimony offered by the Receiver nor did counsel for the Telephone Company object to that testimony. The testimony offered by the Telephone Company was, on motion of the Receiver, stricken from the record as not material to the issues. As noted above there were no evidentry hearings before the District Court on the Petition for Review or on the Receiver's Objections to the Findings of Fact proposed to the District Court by the Telephone Company.

It has long been the rule in this Circuit that the Judge shall accept the Referee's Findings of Fact unless clearly erroneous. This for the reason that the Referee has heard the witnesses and had the opportunity to observe their manner and demeanor and to resolve conflicts in the testimony. Thus, the Referee's Findings of Fact are conclusive upon review by the District Court unless clearly erroneous and should not be disturbed by the District Judge unless there is most cogent evidence of mistake or miscarriage of justice. And it has been

said that a District Judge may not set aside a Referee's order merely because the testimony might lead the Judge to different conclusions from those reached by the Referee; before his judgment may be reversed, the Judge must find that no testimony exists in support of it, or that the Referee has acted arbitrarily and capriciously.

Earhart v. Callan,
221 F. 2d 160 (C.A. 9, 1955)
Cert. denied 350 U.S. 829 (1955);

In re California Associated Products Co.,
183 F. 2d 946 (C.A. 9, 1950);

In re Cummings,
84 F. Supp. 65 (S.D. Cal. 1949);

Ott v. Thurston,
76 F. 2d 368 (C.A. 9, 1935);

Ingram v. Lehr,
41 F. 2d 169 (C.A. 9, 1930).

As was stated by District Judge Yankwich,

"The Referee is entitled not only to the full benefit of his own choice of contradictory versions of a transaction, but to his own inferences from even admitted facts."

In re Cummings,
84 F. Supp. 65, 67 (S.D. Cal., 1949).

And this Court, in Lundgren v. Freeman, 307 F. 2d 104 (C.A. 9, 1962), held, in considering the effect of Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C. 52[a]) on the reviewing court's power to disregard the trial court's findings

of fact, that the Appellate Court may not substitute its judgment if conflicting inferences may be drawn from the established facts by reasonable men, (page 113) and that the clearly erroneous test applies even though it seems the basic facts are undisputed (page 115). Most recently, in the case of Snider v. England, 374 F. 2d 717 (C.A. 9, 1967), this Court said (page 720) that

> "... the 'clearly erroneous' test applies 'even though it seems the basic facts are undisputed,' [citations omitted] ... because the finding in such a case is 'based on the "fact-finding tribunal's experience with the mainsprings of human conduct".'".

In light of the foregoing, the failure of Telephone Company counsel to object to the Receiver's testimony before the Referee, the lack of an evidentry hearing before the District Court and the substantiation of the Referee's Findings of Fact by the evidence and pleadings, the District Court erred in rejecting and modifying the Findings of Fact set out hereinabove and in making its own Findings of Fact. The District Court's Findings of Fact should, therefore, be rejected by this Court and the Referee's Findings of Fact should be adopted in full.

CONCLUSION

A telephone number and its associated service are clearly property within the meaning of §70a(5) of the Bankruptcy Act (11 U.S.C. §110a[5]) and, consequently, the Debtor's telephone number and the service associated therewith, not having been disconnected prior to the initiation of the within proceeding, were in the possession of the Debtor at the time that it filed its Petition herein and passed into the exclusive jurisdiction of the Bankruptcy Court, as that jurisdiction is conferred and defined by §311 of Chapter XI of the Bankruptcy Act (11 U.S.C. §711).

To hold otherwise would be to recognize a clearly unconscionable and self-serving contract by adhesion exacted by the Telephone Company, the owner and operator of a monopolistic utility, from the Debtor under circumstances which deny the implied covenant in all contracts that the parties will act in good faith. Such conduct, if condoned, would permit the destruction of the underlying rehabilitative purposes and policies of the Bankruptcy Act as well as to permit the Telephone Company to exact payment in full from this Debtor for the privilege of utilizing that which is a necessity if its business is to continue, while the other unsecured creditors of the same class as the Telephone Company face the distinct possibility of receiving substantially less than payment in full on their claims.

Such a result violates the basic precept of the Bankruptcy Act that creditors shall be treated equally with respect to their claims and would deprive the Bankruptcy Court of the duty imposed upon it by Congress to adjudicate the validity and the amount of creditor claims.

The abhorrent result is that preferential treatment is condoned, if not made the ideal, and the administration of estates under the Bankruptcy Act is impeded and delayed, all to the ultimate disadvantage of all of the creditors of the estate.

It is respectfully submitted that the Order of the District Court should be reversed and that the Findings and Order of the Referee in Bankruptcy should stand.

Respectfully submitted,

GENDEL, RASKOFF, SHAPIRO & QUITTNER

By Nathan Markowitz

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Nathan Markowitz

NATHAN MARKOWITZ

§2. Creation of courts of bankruptcy and their jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to --

. . . . . .

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title: Provided, however, That an injunction to restrain a court may be issued by the judge only;

. . . . . .

§70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be

exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized impounded, or sequestered: Provided, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: And provided further, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets;

. . . . . .

b. The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within

sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the lease or give the other party an election to terminate the same is enforceable.

A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

. . . . . .

Sec. 311. Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, whever located.

. . . . . .

Sec. 343. The receiver or trustee, or the debtor in possession, shall have the power, upon authorization by and subject to the control of the court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.

. . . . . .

Sec. 351. For the purposes of the arrangement and its acceptance, the court may fix the division of creditors into classes and, in the event of controversy, the court shall after hearing upon notice summarily determine such controversy.

. . . . . .

4. The operating businesses of the debtor consist of a heavy industrial machine shop and a leasing business. Among the assets of said businesses are the following telephone numbers: 723-6361, 728-7221, 685-7127, 723-3406, 685-7348 and 685-7545.

. . . . . .

20. Rule 11(A) of Respondent's Rules and Regulations (Schedule Cal. P.U.C., 36-T 2d Revised Sheet) provides for the adjudication of any dispute concerning the bills rendered by Respondent to its subscribers for telephone and advertising directory service by the Public Utilities Commission of the State of California after and only if the subscriber deposits the amount claimed by the Respondent with the Public Utilities Commission of the State of California with fifteen (15) days of being given notice to that effect by the Respondent. Upon the Receiver's failure to make such a deposit with the Public Utilities Commission and to submit to an adjudication by that Commission, the Respondent claims the right to discontinue telephone service to the numbers mentioned above. Application of that rule and regulation to the Receiver in the instant case would have the effect of depriving the Bankruptcy Court of its exclusive jurisdiction to classify and adjudicate

the claims of creditors.

. . . . . .

23. Particular telephone numbers, used by businesses over a period of time, acquire value and are normally transferred with a sale of the business either as part of the good will of said business or as a separate asset, to which a specific dollar value is attached. In either event, and as a matter of general business practice, the telephone number of a going business has value, is transferrable and is an intangible asset of that business.

24. For so long as the Petitioner pays current telephone bills promptly it is reasonable to extend the time within which the Receiver will determine whether and which telephone numbers he will retain; this will aid in the administration of this estate and the formulation of a Plan of Arrangement and will in no way prejudice Respondent or cause it any harm or damage.

No. 22341

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, TRUSTEE OF THE ESTATE OF KENDALL INDUSTRIES, INC., a California corporation,

Appellant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Appellee.

On Appeal From the United States District Court Central District of California.

APPELLEE'S ANSWERING BRIEF.

FILED

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No. 22341

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, TRUSTEE OF THE ESTATE OF KENDALL INDUSTRIES, INC., a California corporation,

Appellant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Appellee.

On Appeal From the United States District Court Central District of California.

APPELLEE'S ANSWERING BRIEF.

Statement of Jurisdiction.

Appellee, The Pacific Telephone and Telegraph Company, does not agree with the jurisdictional statement of the Appellant (Appellant's Op. Br. p. 2). The jurisdiction of the District Court is based on Section 39c of the Bankruptcy Act (11 U.S.C. §67c). The jurisdiction of this Court to review the judgment is based on Sections 24 and 25 of the Bankruptcy Act (11 U.S.C. §§47-48).

The District Court's judgment dissolving the Referee's restraining order determined that the Referee did not have jurisdiction in a summary proceeding to render such an order.

Statement of the Case.

Appellant, A. J. Bumb (hereinafter sometimes referred to as "Receiver") is the duly appointed qualified and acting Receiver of the Estate of Kendall Industries, Inc. (hereinafter referred to as "Debtor") [Clk. Tr.—103, Ref. Finding of Fact 2]. Said Receiver as of the date of the District Court's Order was in possession of the real and personal property of said Debtor and operating the business of said Debtor [Clk. Tr.—103, Ref. Finding of Fact 3]. Appellee, The Pacific Telephone and Telegraph Company (hereinafter referred to as "Pacific") is a public utility corporation duly organized and existing under and by virtue of the laws of the State of California rendering telephone services, including the telephone service hereinafter described, pursuant to tariffs, Rules and Regulations on file with the Public Utilities Commission of the State of California [Clk. Tr.—50, Para. I of Response].

Prior to the filing of the Petition under Chapter XI of the Bankruptcy Act by Debtor herein, said Debtor subscribed for and Pacific installed telephone service under telephone Nos. 723-6361, 728-7221, 685-7127, 723-3406, 685-7348 and 685-7545 at Debtor's place of business in Montebello, California [Clk. Tr. —103, Ref. Finding of Fact 4]. On October 19, 1966, the date upon which bankruptcy proceedings were instituted herein, Pacific was rendering telephone service to the Debtor under said telephone numbers [Clk. Tr. —104, Ref. Finding of Fact 11]. At said time the Debtor was in default under its contract of telephone service by reason of nonpayment of charges then due and owing [Clk. Tr.—51, Para. IV of Response, Clk. Tr.—286, District Ct. Finding of Fact—2].

Pacific notified the Receiver by letter of October 24, 1966 that the services would be discontinued unless the bills then in arrears were paid by October 31, 1966 [Clk. Tr.—53, Para. VII of Response, and Ex. 1]. The Rules and Regulations on file with the California Public Utilities Commission provided that Pacific had the right to discontinue said telephone services upon the giving of at least five days' written notice as to any bill in arrears [Clk. Tr.—56, 59, Ex. "A" to Response, Rule and Regulation 6 and 11].

The Receiver was notified by Pacific that if the Receiver desired to make his own arrangements for telephone services he could do so at the Debtor's address but that if he wished to continue the same services it would be necessary for the Receiver to supersede to the Debtor's services and make arrangements satisfactory to Pacific to pay the amount then in arrears [Clk. Tr.—52, Para. VI of Response; Clk. Tr. —287, District Ct. Finding of Fact 6].

No evidence contrary to Pacific's verified Response [Clk. Tr.—50] and Exhibit 1 (letter of October 24, 1966) was presented to the Bankruptcy Court that sums for telephone service to the Debtor were past due and Receiver's counsel agreed at that time that some amount was due [Rep. Tr. p. 9 of Nov. 17, 1966 hearing]. Receiver's counsel also agreed at the hearing held on June 5, 1967 before the District Court that there was a bill due [Rep. Tr. p. 48, hearing of June 5, 1967; Clk. Tr.—286, District Court Finding of Fact 2].

The specific amounts in arrears for telephone service for each telephone number and the date of each delinquent bill were set forth in Pacific's Response

[Clk. Tr.—51]. Furthermore, a copy of the statement showing the same information was enclosed with the letter of October 24, 1966 [Ex. 1].

Pacific has been and is agreeable to furnishing telephone services to the Receiver under the same telephone numbers which had been assigned to the Debtor only if the Receiver supersedes to the telephone services theretofore rendered to the Debtor making an arrangement acceptable to Pacific to pay outstanding charges against the Debtor's telephone services in accordance with said Rules and Regulations. On the other hand, Pacific has at all times been willing to furnish telephone services to the Receiver under different telephone numbers from those of Debtor without requiring payment of any part of the charges for telephone service incurred by the Debtor prior to the institution of bankruptcy proceedings and without any referral of telephone calls from present telephone numbers of the Debtor to any new telephone numbers for the Receiver [Clk. Tr.—52, Para. VI of Response].

On November 1, 1966 the Receiver filed a verified application seeking to restrain Pacific from discontinuing said telephone service [Clk. Tr.—47] and on the same date the Referee issued a Temporary Restraining Order restraining Pacific from discontinuing telephone services to the Receiver under the telephone numbers which had previously been issued to the Debtor [Clk. Tr.—45]. Pacific filed its Response objecting to the Bankruptcy Court exercising summary jurisdiction and specifically refusing to consent thereto [Clk. Tr.—54, Para. X of Response]. After the hearing before the Referee on November 17, 1966, an order was made and filed on February 6, 1967, which

restrained Pacific from discontinuing telephone services to the Receiver under the telephone numbers being used by the Debtor prior to the institution of bankruptcy proceedings [Clk. Tr.—110] Pacific filed objections to and requested a hearing on the proposed findings of fact, conclusions of law and order, but no hearing was held and only one change was made by the Referee in the proposed findings of fact [Clk. Tr.—122, Ref. Findings of Fact 21]. Although the Referee's Certificate implies that there were some factual issues involved, the Referee, during oral argument on November 17, 1966, viewed the matter as being solely a legal issue [Rep. Tr. p. 28 of Nov. 17, 1966 hearing].

The Receiver states that the telephone service continued uninterrupted after the filing of the Petition under Chapter XI and before the restraining order was obtained (Appellant's Op. Br. p. 8). The record is clear that Pacific attempted to introduce evidence at the hearing before the Referee explaining why the telephone service had not been disconnected prior to the restraining order being issued. The Referee refused to let such evidence be introduced [Rep. Tr. pp. 26 and 27, Nov. 17, 1966 hearing].

Pacific filed on February 15, 1967 its Petition for Review of the Referee's said order [Clk. Tr.—112]. Hearing was held on the Petition for Review on May 1, 1967. Findings of Fact and Conclusions of Law were entered on June 28, 1967 and Judgment was entered on June 29, 1967, which dissolved the order previously made by the Referee [Clk. Tr.—285]. By order pursuant to stipulation of the parties the judgment of the District Court was then stayed pending determination of the Receiver's appeal [Clk. Tr.—294].

Summary of Argument.

The Receiver has no property interest in the telephone numbers previously issued to the Debtor. The Rules and Regulations on file with the California Public Utilities Commission are a part of the contract for service and have the force and effect of law. They specifically provide that a subscriber has no proprietary right in a telephone number. Therefore, the Receiver has not shown and cannot show any basis for the exercise of summary jurisdiction.

The Bankruptcy Court did not have summary jurisdiction over the subject matter of this controversy because this controversy does not involve any property in the actual or constructive possession of the Debtor or owned by the Debtor at the time that bankruptcy proceedings were instituted upon which the Bankruptcy Court could base an exercise of summary jurisdiction.

Even if it were found that summary jurisdiction existed, the Restraining Order issued by the Referee had the effect of allowing the Receiver to adopt the benefits of executory contracts between the Debtor and Pacific without adopting their burdens. Such a result is clearly contrary to established law.

ARGUMENT.

I.

The Bankruptcy Court Did Not Have Summary Jurisdiction Over the Subject Matter of This Controversy.

The decisive issue on this appeal is whether the Bankruptcy Court had jurisdiction to summarily adjudicate the controversy. The court below correctly held that there was no such jurisdiction.

Bankruptcy courts are statutory courts and have only such jurisdiction as is conferred on them by Congress (*Chicago Bank of Commerce v. Carter* (8th Cir. 1932), 61 F. 2d 986, 988, *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 166). In ordinary bankruptcy proceedings the court's jurisdiction to adjudicate controversies summarily is confined to those controversies which relate to property which is in the actual or constructive possession of the court (Bankruptcy Act, §23, 11 U.S.C. §46; *Cline v. Kaplan* (1944), 323 U.S. 97, 98; *Collier on Bankruptcy,* 14th Ed., Vol. 2, pp. 452-459; Ibid. Vol. 8, pp. 166-175). As the Supreme Court stated in *Cline v. Kaplan:*

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson v. Magnolia Co.,* 309 U.S. 478, 481. If the property is not in the court's possession and a third person asserts a *bona fide* claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.' *Galbraith v. Vallely,* 256 U. S. 46, 50; *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426 * * *" (323 U.S. 98).

Once it is determined that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit (*Cline v. Kaplan* (1944), 323 U.S. 97, 99). At no point in this proceeding has it been suggested that Pacific's claim is frivolous.

These fundamental and well-established principles of bankruptcy jurisdiction have been consistently applied. In *In re Adolf Gobel, Inc.* (2nd Cir. 1936), 80 F. 2d 849, 852, the debtor-in-possession in a section 77B proceeding sought by motion to enjoin the General American Tank Car Corporation from prosecuting an action in an Illinois court against an Iowa corporation whose common stock was wholly owned by the debtor. The Illinois action was for breach of a car leasing contract between General American and the Iowa corporation. The court held that there was no jurisdiction to enjoin the prosecution of the Illinois action because it did not interfere with any property owned by or in the possession of the debtor. The same question was presented in *In re Journal-News Corp.* (2nd Cir. 1951), 193 F. 2d 492, where on motion of the debtor-in-possession in a Chapter XI proceeding the District Court enjoined the sale of stock of the debtor corporation pursuant to contracts between the debtor's stockholders and the purchasers. The court reversed, holding that:

> "The bankruptcy court has exclusive jurisdiction of the debtor and his property. 11 U.S.C.A. §711. But the debtor has no property interest in the shares of its stock owned by its stockholders. Consequently the court had no jurisdiction to restrain disposal of their stock." (193 F. 2d 492).

These decisions compel the conclusion that the Bankruptcy Court was without jurisdiction summarily to adjudicate this controversy.

A. Appellant Had No Proprietary Interest in the Telephone Numbers.

There is no issue in this case as to appellant's right to receive telephone service. The sole issue is whether the bankrupt had a property interest in certain telephone numbers. The Rules and Regulations applicable to the telephone service in question expressly provide that:

> "The assignment of a number to a subscriber's telephone service will be made at the discretion of the Company. The subscriber has no proprietary right in the number * * *" [Clk. Tr.—62].

This Rule—on file with the California Public Utilities Commission—is part of the contract for services, has the force and effect of law, and is binding upon both Pacific and its subscribers.

Hischemoeller v. Nat. Ice etc. Storage Co. (1956), 46 Cal. 2d 318, 324-328, 294 P. 2d 433, 437-438;

J. Breuner Co. v. Western Union Tel. Co. (1930), 108 Cal. App. 243, 250, 291 Pac. 445, 448-449;

Western Un. Tel. Co. v. Esteve Bros. & Co. (1921), 256 U.S. 566, 571-572.

The identical Rules and Regulations involved in the instant case were involved in *Slenderella Systems of Berkeley v. Pacific T. & T. Co.* (2nd Cir. 1961), 286 F. 2d 488, wherein the identical jurisdictional question

here involved was before the Court of Appeals for the Second Circuit. Eleven debtors-in-possession sought an order enjoining Pacific from changing the telephone numbers assigned to them or, in the alternative, if new telephone numbers were assigned to them, that an order be made directing Pacific to furnish, on a referral basis, the new numbers so assigned to persons calling the old numbers. The court held that, since a subscriber has no proprietary right in a telephone number under California law and under the contract between the parties, "[t]he telephone numbers were thus not property of each debtor such as to give the Bankruptcy Court summary jurisdiction" (286 F. 2d 490). The court noted that:

> "The license to use a specific telephone number does not amount to the possession required as a basis for summary jurisdiction" (286 F. 2d 490).

In relation to the question whether the contract between the parties gave rise to property rights within the meaning of the Bankruptcy Act, the court held:

> "* * * if the debtors are to have recourse for [an alleged] violation of a contract right, it must be by way of a plenary action. Where a substantial issue of law or fact exists as to title, and where the debtor was not in physical possession of the property on the date of filing his petition, the rights under the contract should not be settled in a summary proceeding [citing cases]. Thus, there being no property of the debtor involved in this controversy, the Bankruptcy Court does not have summary jurisdiction" (286 F. 2d 490).

The Receiver points out that there is no tariff that requires the telephone company to give or not to give

referral service (Appellant's Op. Br. p. 8). In the *Slenderella* case the debtors-in-possession also through a summary proceeding unsuccessfully sought referral service as an alternative to retention of the same telephone number. Referral service in lieu of following the supersedure regulations is an obvious circumvention and violation of the supersedure regulations.

B. Appellant Has Not Shown, and Cannot Show, Any Basis for the Exercise of Summary Jurisdiction by the Bankruptcy Court.

It is therefore clear that a telephone subscriber has no proprietary interest in a telephone number so as to support the exercise of summary jurisdiction by the Bankruptcy Court. The dictum which appellant quotes in support of his erroneous assertion that there is a protectible property interest in telephone numbers under the law of California (Appellant's Op. Br. p. 15) states only that equity will protect certain personal rights as well as property rights (*Orloff v. Los Angeles Turf Club* (1947), 30 Cal. 2d 110, 116-118, 180 P. 2d 321, 324-325). It does not define those rights or the term "property." It therefore provides no basis whatever for the exercise of summary jurisdiction.

Appellant attempts to avoid the controlling California law and the decision of the Second Circuit in the *Slenderella* case on two grounds. He erroneously asserts (1) that the California law is in "conflict" with the Bankruptcy Act, and (2) that the contract between Pacific and its subscribers is an invalid "contract of adhesion."

(1) Appellant acknowledges that "it is normally true that the ownership of property ordinarily depends

upon state law" (Appellant's Op. Br. p. 17). Appellant then infers (p. 17) that there is some "conflict" between the Bankruptcy Act and the applicable California law. Appellant's main argument in this regard appears to be based upon his erroneous assertion that a telephone number is "property" which can be "transferred" and that it therefore falls within section 70(a)(5) of the Bankruptcy Act (see Appellant's Op. Br. pp. 20-25). To support this assertion, appellant ironically relies (p. 21) upon a portion of the very Rules and Regulations governing telephone service which he seeks to avoid. However, the applicable Rule [Rule and Regulation 23(b); Clk. Tr.—63] does not provide for transfer of a telephone number. It provides a procedure under which an applicant for services can obtain the same telephone number as a present subscriber when that subscriber is discontinuing the service—provided that the applicant is to take service on the same premises, that both give written notice to that effect, and that an arrangement satisfactory to the telephone company is made by the applicant to assume all the obligations of the outgoing subscriber.

Appellant places great reliance upon cases which held that a membership in a board of trade was property which passed into the possession of the court (*Chicago Board of Trade v. Johnson* (1924), 264 U.S. 1; *Board of Trade of City of Chicago v. Weston* (7th Cir. 1917), 243 Fed. 332). However, in each of those cases it was undisputed that the board rules permitted transfer of the membership to any eligible party (264 U.S.

7, 11; 243 Fed. 334, 336). Moreover, those very cases also held that the property in question passed subject to and encumbered by the applicable rules and regulations of the board (264 U.S. 14-15; 243 Fed. 336). Thus, they do not, as appellant erroneously asserts, demonstrate "[t]hat such tariffs [as are applicable in this case] are not binding upon the Bankruptcy Court" (Appellant's Op. Br. p. 32). On the contrary, the cases in question recognize the validity of encumbering restrictions. Such restrictions are no less valid in the instant case.

Appellant also places reliance upon the cases of *Segal v. Rochelle* (1966), 382 U.S. 375; *Barutha v. Prentice* (7th Cir. 1951), 189 F. 2d 29; and *Garber v. Bankers' Mortgage Co.* (D.Kan. 1928), 27 F. 2d 609. None of those cases involved the question of summary jurisdiction. Each was concerned solely with the question of whether a particular transferable interest passed to the trustee or whether it passed to the bankrupt.

(2) In another attempt to avoid the binding effect of the applicable Rules and Regulations, appellant erroneously argues that the contract between Pacific and its subscribers is an unreasonable "contract of adhesion" under California law (Appellant's Op. Br. pp. 27-33). However, the theory of "contract of adhesion" is not applied to public utilities regulated by governmental agencies such as the California Public Utilities Commission (*J. Breuner Co. v. Western Union Tel. Co.* (1930), 108 Cal. App. 243, 250-251, 291 Pac.

445, 448-449). And, as pointed out (*supra,* p. 9), it has been expressly held in California that such Rules and Regulations are a valid part of the contract between the parties and are binding upon both the subscriber and Pacific.

Furthermore, recent history demonstrates that the California Public Utilities Commission has and does investigate the reasonableness of Rules and Regulations governing telephone service and that it may and does change or disapprove them (see *California Telephone Corporation,* Dec. No. 69447 (1965), 65 Cal. P.U.C. 526, monitoring; *Pac. Tel. & Tel. Co.'s Rules,* Dec. No. 69942 (1965), 65 Cal. P.U.C. 103, limitation of liability; *P.T. & T. Co.,* Dec. No. 70839 (1966), 65 Cal. P.U.C. 661, wide area telephone service). The very Rule and Regulation—that "[t]he subscriber has no proprietary right in the [telephone] number"—which appellant seeks to evade was approved by the California Public Utilities Commission. In *Crocker Hotel Co. v. Pacific Tel. and Tel. Co.,* Dec. No. 35238 (1942), 44 C.R.C. 127, 128, the commission noted:

> "Similar rules are uniformly approved by state regulatory bodies as essential to the maintenance of efficient service to telephone subscribers generally."

The Commission indicated (44 C.R.C. 128) that, in an appropriate case, it would examine the reasonableness of the applicable Rule and Regulation, as well as the question whether the telephone company might have acted in an arbitrary or capricious manner. Thus, any

question as to its propriety and reasonableness should first have been addressed to the California Public Utilities Commission. In the absence of any such challenge directed to the Commission, the reasonableness of the applicable Rule and Regulation is conclusively established (*Morse v. Pacific Gas & Elec. Co.* (1957), 152 Cal. App. 2d 854, 859, 314 P. 2d 192, 195).

And, contrary to appellant's assertions (Appellant's Op. Br. p. 31), the reasonableness of the Rule in question is manifest. If a subscriber could obtain a proprietary interest in a telephone number, telephone companies would of necessity be required to undertake the obviously vast and difficult task of keeping track of developed and developing "rights" in various telephone numbers. The assignment of telephone numbers would become increasingly more complex and telephone companies would inevitably become involved in litigation regarding respective "rights" in telephone numbers. The California Public Utilities Commission has determined that such results should be avoided. The reasonableness of that determination cannot be called into question in this proceeding.

Thus, appellant has failed in his attempt to assail the controlling California law and the contract between the parties. He has not shown, and cannot show, any basis for the exercise of summary jurisdiction. As the Second Circuit held in the *Slenderella* case:

> "The summary jurisdiction of the Bankruptcy Court does not extend to 'all litigation between the debtor and third persons.' [citing cases] If appellants have a remedy it is by way of a plenary action and not a summary procedure before the Bankruptcy Court" (286 F. 2d 491).

II.

The Bankruptcy Court Did Not Have Summary Jurisdiction to Compel Performance of a Contract Which Is Subject to Termination.

The Receiver argues (Appellant's Op. Br. p. 41) that he needs time to determine whether it is in the best interest of the bankrupt estate to assume the contract for telephone services. But the Bankruptcy Court did not have jurisdiction to compel performance of a contract which is subject to termination and which Pacific sought to terminate and would have but for the issuance of the restraining order. The Bankruptcy Court cannot take away the right of the other party to a contract to terminate that contract when it has been materially breached by the Debtor.

On October 24, 1966 prior to the issuance of the Temporary Restraining Order made on November 1, 1966, Pacific gave to the Receiver written notice of termination of its telephone service contracts with the Debtor and disconnection of that service unless the Receiver availed himself of the supersedure procedure [Ex. 1]. The right of Pacific to terminate the contract is recognized by principles of contract law and is required by Rules and Regulations on file with the Public Utilities Commission.

The Bankruptcy Court does not have summary jurisdiction to require Pacific to perform the contract where the Debtor is in default under the contract.

In Re Ballou (D.C. Ky. 1914), 25 Fed. 810, 813;

Texas & N. O. R. v. Phillips (5th Cir. 1954), 211 F. 2d 419, 420;

Collier on Bankruptcy, 14 Ed., Vol. 2, p. 1432, *et seq.*

The Receiver's application for the Restraining Order spoke in terms of needing time to decide whether to accept or reject the executory contract. Section 313 of the Bankruptcy Act under Chapter XI, only provides that the court may permit the rejection of executory contracts of the Debtor. A receiver under Chapter XI where the debtor is in default of contract obligations cannot rightfully prevent the exercise of the legal right of the nondefaulting party to terminate the contract (*Urban Properties Corporation v. Benson, Inc.* (9th Cir. 1940), 116 F. 2d 321, 325). As the leading commentator states in reference to Section 313:

> "The jurisdiction given by §313(1) to permit the rejection of executory contracts of the debtor does not affect the right, if any, of the other party to the contract to terminate the same. If the contract provides that upon the happening of a certain event such as the filing of a petition under the Act by either party, the other party has an option to terminate the contract, then upon the occurrence of that event the other party may exercise his option. Or, if the debtor has defaulted in performance, and the breach is such as would entitle the other party to terminate the agreement under ordinary principles of contract law, then the other party to the contract may terminate the same. In either event if the contract has been ter-

> minated by the election of the other party, there is no longer in existence an executory contract which can be either rejected or assumed."
>
> *Collier on Bankruptcy,* 14th Ed., Vol. 8, pp. 225-226.

In effect, the Receiver sought to reject an executory contract in part and assume it in part, that is, the Receiver sought to assume the executory contract as to the particular telephone numbers involved but tried to reject the executory contract insofar as it provided that such numbers were subject to disconnection. An executory contract cannot be rejected in part and assumed in part (*In Re Klaber Bros., Inc.* (S.D.N.Y. 1959), 173 F. Supp. 83, 85).

> "An executory contract cannot be rejected in part and assumed in part. The debtor, or the trustee, is not free to retain the favorable features of the contract and reject only the unfavorable ones. Assumption carries with it all of the burdens as well as the benefits of the contract. The contract must be rejected in its entirety, or not at all."
>
> *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 228.

The Receiver argues that Section 70b of the Bankruptcy Act was a sufficient basis upon which to permit the court to restrain Pacific from disconnecting the service until the Receiver had decided whether or not to assume the executory contract. Section 70b is not applicable to this case. In any event both the benefits

and the burdens must be assumed (*In Re Mesa Steel Corp.* (D. Ariz. 1964), 229 F. Supp. 669, 673; *In Re Swindle* (D. Ore. 1960), 188 F. Supp. 601, 604). The leading commentator states:

> "The legislative purpose back of §70b is to solve the problem of *assumption of liabilities.* It is conceivable that a system of bankruptcy law might compel the non-bankrupt party to a contract, the performance of which is incomplete as to both contracting parties, to continue performing while for the counterpart refer him to a mere dividend out of the estate. *Needless to say, such a solution is neither wise from the viewpoint of commercial credit, nor fair from the viewpoint of equity. It neglects one of the basic principles of equity, mutuality of obligation and performance.* What §70b actually proposes to do is precisely to secure this continued mutuality wherever it is felt to be of greater benefit to the estate to proceed in accordance with the bankrupt debtor's plan rather than to freeze his commercial relations as of the filing date. The price for securing the potential margin of benefit to the estate is high. It is nothing short of complete mutuality, that is assumption by the estate of the bankrupt's liabilities, not as a matter of granting a distributive share, but by performance in full, just as if bankruptcy had not intervened."
>
> *Collier on Bankruptcy*, 14th Ed., Vol. 4A, p. 524.

III.

Appellant Is Entitled to No Different Treatment Than Any Other Subscriber to Telephone Service.

The Receiver argues (Appellant's Op. Br. p. 36) the Bankruptcy Court is ousted of its jurisdiction if the Rules and Regulations on file with the California Public Utilities Commission concerning disputed bills are followed. This argument is fallacious.

First of all there is no issue over a disputed bill. The Receiver's counsel admitted some sum was due [Rep. Tr. p. 9 of Nov. 17, 1966 hearing; Rep. Tr. p. 48 of June 5, 1967 hearing] and the Receiver would not offer to pay the sum which was past due whatever the amount. The Receiver argues (Appellant's Op. Br. pp. 37-38) that the amount claimed by Pacific as being due in Pacific's letter of October 24, 1966 to the Receiver [Ex. 1] is at variance with the amount set forth in Pacific's Response. The Response of Pacific on its face showed the date of each delinquent bill for each telephone number and the specific amount due for each bill [Clk. Tr.—51]. The specific amounts set forth when added together show a total of $2,006.80. The total amount claimed in the same paragraph in the Response is $3,980.36, which was an inadvertent error. At no time did the Receiver or his counsel ever point out the discrepancy in Pacific's Response until the Receiver filed objections to the first proposed findings of fact, conclusions of law and judgment of the court below in May of 1966 after the

court below had indicated it would dissolve the Referee's order. Also, the letter of October 24, 1966 [Ex. 1] refers to a bill enclosed therewith. The bill lists the telephone numbers and the amounts due and the dates of the delinquent bills which were subsequently set forth in the Response. Unfortunately, the total shown on the statement was in error but the error would be manifest as soon as the specific amounts for each telephone number were added. Obviously, if only the amount was in question, that would have been resolved long ago.

Second, the Receiver wants to continue telephone service under the same telephone numbers formerly being used by the Debtor and the Receiver is just like any other subscriber in relation to the Regulations and Rules on file with the California Public Utilities Commission. The Receiver is entitled to no better treatment than any other member of the public and current service being used by him is subject to those Rules and Regulations. For Pacific to do otherwise would involve illegal discrimination in favor of the Receiver. Third, if the Receiver had requested telephone service over a new number, he would be bound by all of the Regulations and Rules and tariffs concerning such service. If he failed to pay for the service, he would be subject to disconnection. If he disputed the amounts of the bill, he would be bound to follow the tariffs and pay the amount of the bill to the Public Utilities Commission in accordance with the tariffs. This is not ousting the Bankruptcy Court of jurisdiction. This is

simply a matter of contract law and if the Receiver enters into contracts or assumes contracts, he is bound by them and if not, then he is subject to whatever remedies the other contracting parties may have without regard to the pendency of the Bankruptcy proceeding. *Urban Properties Corporation v. Benson, Inc.* (9th Cir. 1940), 116 F. 2d 321, 325; *In Re Mesa Steel Corp.* (D. Ariz. 1964), 229 F. Supp. 669, 673; *In Re Swindle* (D. Ore. 1960), 188 F. Supp. 601, 604; *In Re Klaber Bros., Inc.* (S.D.N.Y. 1959), 173 F. Supp. 83, 85). 28 U.S. Code, Section 949(a) provides that the Trustee or Receiver may be sued without leave of court with regard to any acts or transactions in carrying on the Debtor's business.

The Receiver further argues (Appellant's Op. Br. p. 32) that the "property", that is the telephone numbers, was in the possession of the Debtor at the time the Chapter XI proceeding was filed. The telephone number is an intangible. This is admitted by the Receiver [Clk. Tr.—156]. The telephone numbers were not in the physical possession of the Debtor. The telephone number is an incident of the telephone company's switching system. The switching system is located in Pacific's central offices, all of which are owned, occupied and possessed solely by Pacific. There is nothing in the telephone instrument or lines located on the Debtor's property which has anything to do with the telephone number itself [Rep. Tr. p. 76 of June 5, 1967 hearing]. Pacific is engaged in providing telephone service unlike other utilities which provide commodities such as electricity, gas and water.

IV.

The District Court Properly Modified the Referee's Findings of Fact, Which Were Erroneous Legal Conclusions, Irrelevant or Inconsistent With Other Findings.

Contrary to the assertions of the Receiver (Appellant's Op. Br. p. 41), those of the Referee's Findings which were modified by the District Court were not factual findings but were erroneous legal conclusions, were irrelevant to the legal issues before the court, or were inconsistent.

As shown by the very cases cited by the Receiver, a referee's legal conclusions are not binding on the District Court. *Lundgren v. Freeman* (9th Cir. 1962), 307 F. 2d 104, 115. Where the question is one of law, the findings may be set aside. (*Kwikset v. Hillgreen* (9th Cir. 1954), 210 F. 2d 483, 488. Therefore, the District Court was free to reject or modify the Referee's legal conclusions. Merely applying the label of "Findings of Fact" does not make facts out of legal conclusions.

The other cases cited by the Receiver are inapplicable. Thus, in *In Re California Associated Products Co.* (9th Cir. 1950), 183 F. 2d 946, 949, the court merely held that factual findings supported by the record were not to be disturbed absent abuse of discretion. The case is not in point because the findings modified by the District Court in our case were legal conclusions.

In *Earhart v. Callan* (9th Cir. 1955), 221 F. 2d 160, 164, the court held that the trial court could enter the referee's findings as its own. The case has nothing to do with the power of the District Court to modify a referee's findings.

The case of *Ott v. Thurston* (9th Cir. 1935), 76 F. 2d 368, 369, simply holds that it was proper for the District Court to follow a referee's findings made on a disputed factual issue. The case of *Ingram v. Lehr* (9th Cir. 1930), 41 F. 2d 169, 170, is to the same effect as the prior case.

The court in *Snider v. England* (9th Cir. 1967), 374 F. 2d 717, 720, refused to draw its own inferences from undisputed facts. However, the undisputed facts involved a question of whether a transfer was preferential. The case is unrelated to the issue presented by our case.

In Re Cummins (S.D. Cal. 1949), 84 F. Supp. 65, involved factual disputes resolved by the referee.

In *Lundgren v. Freeman,* 307 F. 2d 104 (9th Cir. 1962), the court ruled that it was bound by the District Court's reasonable inferences drawn from facts established by documentary evidence. The court stated, however, in its opinion at page 115 as follows:

> "A finding of fact, to which the clearly erroneous rule applies, is a finding based on the 'fact-finding tribunal's experience with the mainsprings of human conduct'. A conclusion of law would be a conclusion based on application of a legal standard. Many Ninth Circuit cases espousing the *Frank* view are explainable as applying the rule that courts of appeal need give no weight to a trial court's conclusions of law." (307 F. 2d 115)

Thus, in the instant case, the District Court could modify legal conclusions of the Referee. In fact the Referee agreed that only a legal issue was involved [Rep. Tr. p. 28 of Nov. 17, 1966 hearing]. The rele-

vant facts are not in dispute. They are simply that there were charges past due for telephone service, that Rules and Regulations on file with the California Public Utilities Commission governing telephone service required supersedure if the same telephone numbers were to be maintained at the same premises, and provided that the telephone numbers are not property owned by the Debtor.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment should be affirmed.

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Certificate.

I certify that in conection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD D. DELUCE

No. 22341

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. J. BUMB,

Appellant,

vs.

PACIFIC TELEPHONE &
TELEGRAPH CO.,

Appellee.

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On Appeal From
The United States District Court
For the Central District of California

APPELLANT'S REPLY BRIEF

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Appellee.

APPELLANT'S REPLY BRIEF

SUMMARY OF ARGUMENT

I

Since the telephone numbers in question were in the rightful possession of the Debtor upon the filing of the Chapter XI Petition, the Bankruptcy Court had summary jurisdiction to issue the contested restraining order.

II

The contract which the Receiver seeks to assume or reject is severable and separate from the Telephone Company's contract with the Debtor, is not affected by the Receiver's refusal to pay pre-bankruptcy charges and, consequently, is not terminable by the Telephone Company.

III

The doctrine of contract of adhesion applies to the Telephone Company. The Telephone Company's tariffs which seek to define what is and what is not "property" and which seek to establish a procedure for supersedure are unreasonable and discriminatory.

ARGUMENT

I

SINCE THE TELEPHONE NUMBERS IN QUESTION WERE IN THE RIGHTFUL POSSESSION OF THE DEBTOR UPON THE FILING OF THE CHAPTER XI PETITION, THE BANKRUPTCY COURT HAD SUMMARY JURISDICTION TO ISSUE THE CONTESTED RESTRAINING ORDER.

The Telephone Company concedes the summary jurisdiction of the Bankruptcy Court to adjudicate rights to property in its actual or constructive possession, but urges that where the property is in the possession of a third party who asserts a

bona fide adverse claim to it a plenary suit is the only remedy; and then asserts that the Receiver has never suggested that the Telephone Company's claim is frivolous (Appellee's Ans. Br. pp. 7 and 8).

The fallacy of this argument is that the frivolous nature of the Telephone Company's claim has been the very subject of this proceeding from its inception. Secondly, if as the Telephone Company contends, a telephone number is not property, then as to what has the Telephone Company been asserting its adverse claim?

The Receiver's Opening Brief has clearly demonstrated that a telephone number is property, both under the California and Federal decisions relating thereto, and it now appears that the Telephone Company concedes that a telephone number is property. That the telephone numbers in question were in the possession of the debtor and, consequently, the Receiver, at the time of the within Chapter XI proceeding, is undisputed and was so found both by the Referee and the District Judge (R. 104, 286).

As to possession of a telephone number, there are only two alternatives. The first is that the telephone number is held "in inventory" by the telephone company, waiting to be assigned to a subscriber. The second is that the number has been assigned to a subscriber, and is possessed and used by him. The numbers in question were fully possessed by the

debtor on the date of filing of its Chapter XI Petition and were in no way possessed by the Telephone Company since anybody dialing the numbers assigned to the debtor would get the debtor and no other person. Since the test of summary jurisdiction is possession rather than title, the Referee in Bankruptcy was correct in issuing the injunction. 2 Collier on Bankruptcy, 467-468 (14th Ed.); Wuchner v. Goggin, 175 F. 2d 261, 265 (C.A. 9, 1949).

To bolster its ill-founded attack upon the summary jurisdiction of the Bankruptcy Court, the Telephone Company refers to Slenderella Systems of Berkeley v. The Pacific T & T Co., 286 F. 2d 488 (C.A. 2, 1961), wherein, at page 490, the Court says that:

> "The license to use a specific telephone number does not amount to the possession required as a basis for summary jurisdiction."

The use of the word "license" by the Court of Appeals for the Second Circuit is an inappropriate choice of language, since the Telephone Company does not grant a "license." Licenses are of two classes; those issued by the public through its governmental bodies and agencies and those given by private persons. The licenses from the public are those granted by a state or its political subdivisions as a means of regulation or taxation of privileges and occupations, whereas the licenses given by private persons relate only to copyrights, patents,

waters and water rights and real property. 31 Cal. Jur. 2d 209; 33 Am. Jur. 398. The Telephone Company is, therefore, making a sale to its subscribers of a telephone number for their unlimited use and, during that period of use, that telephone number is completely consumed by the subscriber and cannot be used by anyone else, including the Telephone Company. As noted in 2 Bouvier's Law Dictionary, 2572 (3d Ed.), "[t]he right of using a thing indefinitely is an essential quality of absolute property, without which absolute property can have no legal existence. Use is the real sign of property."

Thus, "property" is "...nomen generalissimum and includes everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value, or which goes to make up one's wealth or estate ... and extends to every species of valuable right and interest ...". Globe Indemnity Co. v. Bruce, 81 F. 2d 143, 150 (C.A. 10, 1935). Thus, in Globe, an Indian headright was held to be property and passed to the Trustee in Bankruptcy.

To support its theory that the debtor did not obtain any proprietary interest in the telephone numbers in question, the

Telephone Company cites three cases[1/] for the proposition that its tariffs defining property become a part of the contract between the telephone company and the subscriber and have the force and effect of law, (Appellee's Ans. Br. p. 9). None of those cases involved the telephone company or its tariffs and only the Western Union Telegraph Company case deals with the effect of tariffs, and that case only in conjunction with the interpretation of a Federal statute, the Act of June 19, 1910 to Regulate Commerce. Further, those cases did not deal with any attempted definition of what is or what is not property, but rather with the question of tariffs regulating rates and limiting liability. The only common thread running through those cases is that in each the Court found the tariff in question to be reasonable. As noted in Appellant's Opening Brief (pp. 27-33), the tariffs in question here are far from reasonable.

Even were the tariffs in question reasonable and a part of the contract between the Telephone Company and the debtor and the Receiver, a point that we do not concede, we note that they can be affected by and must give way to the provisions and ultimate purposes of the Bankruptcy Act. As was said in Engstrom v. DeVos, 81 Fed. Supp. 854 (D. C. E. D.

1/ Hirschemoeller v. National Ice, etc. Storage Co., 46 Cal. 2d 318, 294 P. 2d 433 (1956); J. Breuner Co. v. Western Union Telegraph Co., 108 Cal. App. 243, 291 P. 445 (1930); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921).

Washington, 1949):

> "Congress, however, under the Federal Constitution, has the broad power to establish uniform laws on the subject of bankruptcies. U. S. Const. Art. I, Sec. 8, Clause 4. That subject has been defined by the Supreme Court as 'the relations between an insolvent or non-paying or fraudulent debtor, and his creditors extending to his and their relief.' (Citation omitted). This broad power of Congress, when it comes into conflict with State law, is not limited to the procedural field. It may, and, in practice, frequently does, affect substantive rights as well." (81 F. Supp. at 858, 859).

We note also that the "contract provisions" sought to be enforced by the telephone company would cause a forfeiture such as is proscribed by §3275 of the California Civil Code. See also, Wuchner v. Goggin, 175 F. 2d 261 (C.A. 9, 1949).

A forfeiture results since the Telephone Company seeks to deprive the Receiver of the use of the telephone numbers requisite to the financial rehabilitation of the debtor at a time when the Receiver is willing and able to pay in full for the use of those telephone numbers. That refusal is based solely upon a desire to collect unpaid charges preferentially to the claims of other creditors; and does not result from any duty imposed

upon the Telephone Company by its rules and regulations or by law to seek the preferential collection of those charges. Rule 11 (A)(1), of the Telephone Company's Rules and Regulations, which relates to the discontinuance of service, provides only that in the event of non-payment of a bill the telephone service "may" be discontinued. The word "may" is permissive rather than mandatory and is so defined by §14 of the California Public Utilities Act. The permissive aspect of this rule and regulation was further admitted by counsel for the Telephone Company at the hearing before the Referee in Bankruptcy on November 17, 1966. As appears at page 41 of that transcript, it is counsel's "opinion" that the Telephone Company must disconnect service in the event of non-payment of charges and that the Telephone Company "feels obligated" to do so by reason of the tariffs on file with the Public Utilities Commission. However, no legal authority has been cited by the Telephone Company which requires that it terminate service to a subscriber for non-payment of charges or that it refuse to render referral service to the Receiver under the existing facts. Instead, the Telephone Company "interprets" its rules and regulations to make and unmake "property" in an attempt to defeat the jurisdiction of the Bankruptcy Court and to impose a forfeiture upon the Receiver.

The penalty or forfeiture which the Telephone Company thus seeks to impose upon the Receiver, the Bankruptcy Court

and the debtor's creditors bears no rational relationship to the debtor's failure to pay the charges prior to bankruptcy and is, in effect, a forfeiture without regard to the actual damage suffered, especially since the Telephone Company can file a claim for its charges in the within proceeding and will be paid in full for the service rendered to the Receiver. In such a situation, the California courts are loathe to enforce the forfeiture and are quick to relieve against it. Hill v. Hearron, 113 Cal. App. 2d 763, 249 P.2d 54 (1952); Ballard v. MacCallum, 15 Cal. 2d 439, 101 P. 2d 692 (1940); Hopkins v. Woodward, 216 Cal. 619, 15 P. 2d 499 (1932).

II

THE CONTRACT WHICH THE RECEIVER SEEKS TO ASSUME OR REJECT IS SEVERABLE AND SEPARATE FROM THE TELEPHONE COMPANY'S CONTRACT WITH THE DEBTOR, IS NOT AFFECTED BY THE RECEIVER'S REFUSAL TO PAY PRE-BANKRUPTCY CHARGES AND, CONSEQUENTLY, IS NOT TERMINABLE BY THE TELEPHONE COMPANY.

The Telephone Company argues that the Receiver cannot accept the executory contract for telephone service since the Telephone Company has the right to terminate that contract and cannot be deprived of that right when that contract has been materially breached. The Telephone Company argues also that the Receiver cannot accept the executory contract without

assuming all of its burdens, including payment in full of the past-due obligations. These arguments are predicated upon the theory that the contract for telephone service is an indivisible and entire contract which is "executory" within the meaning of §§70(b) and 313(1) of the Bankruptcy Act. (11 U.S.C. §§110[b] and 713[1]). (Appellee's Ans. Br., pp. 16-19). Such, however, is not the case.

To support its position, the Telephone Company quotes extensively from 8 Collier on Bankruptcy, 225-226 and 228 (14th Ed.) and 4A Collier on Bankruptcy 524 (14th Ed.). However, the Telephone Company overlooks the language set forth in 4 Collier on Bankruptcy 1350-1351 (14th Ed.):

> "Now, if a vendor sold merchandise to a subsequently bankrupt purchaser and conveyed unconditional title to him, but the bankrupt failed to pay any part of the purchase price the contract is certainly 'executory.' And yet it is obvious that this is not the situation in which the Trustee is ... called upon to assume or reject. The vendor, unless secured, will file his Proof of Claim for the entire purchase price, and what the Trustee will do is possibly to object to the claim but not to reject or assume the contract."

Clearly, therefore, what Collier and the Bankruptcy Act are talking about is a contract where the performance on both

sides is wholly in futuro. In such a situation, neither party has rendered any performance and the inability of the bankrupt to perform is clearly a material breach and therefore a ground for the non-bankrupt party to terminate the contract. Such is not the situation in this case.

Here, two separate and distinct contracts exist. The first contract is that which existed between the telephone company and the Debtor. As to that contract, the Telephone Company has performed fully, whereas the debtor has not yet performed since it has not paid the Telephone Company for a portion of the services rendered by it to the debtor. As to that contract, the Telephone Company is in no different position from that occupied by any other unsecured creditor who has rendered services or sold merchandise to the debtor. That is, the Telephone Company has the right to file an unsecured claim in the within proceeding for the amounts owed to it. Further, and more basically, the contract which existed between the Telephone Company and the debtor was itself severable and divisible into monthly contracts since it provided for the Telephone Company to render telephone service to the debtor on a monthly basis for which the Telephone Company was to be paid a specified charge each month. Upon failure of the debtor to comply with the payment requirement of that contract, the Telephone Company would have the right, but not the duty, to terminate the next month's service (Telephone Company Rule

and Regulation 11[A]1). Such a situation falls clearly within the tests for a divisible contract enunciated in §266(3) of the Restatement of Contracts:

> "(a) Performance of each party is divided into two or more parts;
>
> "(b) The number of parts due from each party is the same;
>
> "(c) The performance of each part by one party is the agreed exchange for a corresponding part by the other party."

The Restatement gives the following illustration:

> "A promises to sell B and B to buy 10,000 tons of coal at $8 per ton. A promises to deliver the coal in monthly installments of 1,000 tons each and B promises to pay for each installment 10 days after delivery. The contract is divisible when each month's payment and installments are the agreed exchange."

Substituting the facts in the instant case, we have the following:

> The Telephone Company promises to provide telephone service to the debtor and the debtor promises to pay for the services at the prevailing rates. The Telephone Company further promises to service the account on a monthly basis and bill for monthly service, and

the debtor promises to pay for the amount of services used each month. The contract is divisible since each month's supply of service and payment for the same are the agreed exchange.

The second contract is that which the Receiver may seek to accept between himself and the Telephone Company. That contract is wholly executory, and is completely divisible and severable using the tests enunciated above. However, as a completely executory contract, that is, one where the performance to be rendered by each party is wholly in futuro, it falls within the requirement of mutuality set forth in the Telephone Company's answering brief as noted above. There is no lack of mutuality with regard to this contract since the record clearly establishes that the Receiver has sufficient funds on hand and is capable of paying fully all current charges billed by the Telephone Company for the services which the Receiver requests. Likewise, the Telephone Company is fully capable of rendering to the Receiver all of the services which he will request in futuro. Since such services are to be rendered to the Receiver in his capacity as such, they will be an expense of administration of the estate and will bear a priority in payment over the claims of the other creditors. Thus, the Telephone Company is assured of payment for its services as they are rendered.

Even were the Telephone Company's argument sound and had the Receiver sought to reject what the Telephone Company terms an executory contract insofar as it provides that the numbers are subject to disconnection, he could do so under this Court's ruling in United Artists Corp. v. Strand Productions, 216 F. 2d 305 (C.A. 9, 1954). This Court there stated that when an executory portion of an agreement is severable from the rest of that agreement, rejection of that portion alone might be permitted (at page 312). Although in that case the contract involved was not severable, the contract in this case is, as noted above.

Even were the Telephone Company correct in arguing that the Receiver must pay the pre-brankruptcy charges in full in order to assume the contract for service, we note that since the telephone number is property in the possession of the Debtor the Bankruptcy Court has summary jurisdiction to enjoin disconnection, extend the time within which the Receiver may assume or reject the contract and determine when and how payment shall be made. Section 357(2) and (8) of Chapter XI (11 U.S.C. §§757[2] and [8]) permits the Plan of Arrangement to provide for the rejection of executory contracts and to contain any appropriate provisions not inconsistent with Chapter XI. Thus, if the Plan provides for assumption of the contract, and if the Telephone Company's contention as to payment is correct, the Bankruptcy Court can require payment

of the pre-bankruptcy charges as a condition precedent to approving assumption of the contract. But to condition the Receiver's request for an extension of time within which to determine whether to accept or reject the contract upon immediate payment of the pre-bankruptcy charges is unrealistic, imposes an onerous burden on the Receiver, the estate and its creditors and derogates from the salutory rehabilitative purpose of Chapter XI.

III

THE DOCRTINE OF CONTRACT OF ADHESION APPLIES TO THE TELEPHONE COMPANY. THE TELEPHONE COMPANY'S TARIFFS WHICH SEEK TO DEFINE WHAT IS AND WHAT IS NOT "PROPERTY" AND WHICH SEEK TO ESTABLISH A PROCEDURE FOR SUPERSEDURE ARE UNREASONABLE AND DISCRIMINATORY.

The Telephone Company cites J. Breuner Co. v. Western Union Telegraph Co., 108 Cal. App. 243, 291 P. 445 (1930), for the proposition that the theory of contract of adhesion is not applied to public utilities regulated by governmental agencies such as the California Public Utilities Commission (Appellee's Ans. Br. pp. 13-14). In that case, the Court absolved the Telegraph Company from liability for the misdelivery of a telegram, holding that its rules and regulations respecting the limitation of liability and the delivery of telegrams were

reasonable. The Court, however, did not even talk about the doctrine of contract of adhesion, let alone hold that that doctrine does not apply to public utility companies.

Further, this assertion by the Telephone Company is in direct contradiction of §451 of the California Public Utilities Act which provides, in pertinent part:

> ". . . All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

As noted in our opening brief, at page 29, the doctrine of contract of adhesion is a doctrine of reasonableness. This doctrine is clearly enunciated in §451 of the California Public Utilities Act, both as to the services by a public utility and the rates to be charged therefor.

Section 451 of the California Public Utilities Act requires also that all charges demanded or received by any public utility for the services rendered or to be rendered by it must be just and reasonable and §454 of the California Public Utilities Act prohibits public utilities from raising any rate or altering any classification, contract, practice, or rule so as to result in any increase in any rate except upon a showing before the Public Utilities Commission and a finding by it that such increase is justified. If effect is given to the Telephone Company's rule for supersedure and the Receiver required to pay in full for past-due charges, the result will be:

(1) The Telephone Company will receive a preference in payment of its claim over the claims of the other unsecured creditors.

(2) These additional charges will, in effect, have been added to the rate charged the Receiver, which results in an increase in the rate to him without a showing before the Public Utilities Commission and a finding by it that the increase is justified.

(3) This impost subjects the Receiver to a prejudice and disadvantage vis-a-vis other and similar businesses utilizing the same telephone service at the normal, commission-approved rate; a practice condemned and prohibited by Section 453 of the California Public Utilities Act.

By subjecting the Receiver to such prejudice and disadvantage, the rate clearly becomes unjust and unreasonable and, as provided by §451 of the California Public Utilities Act, "[e]very unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful."

The Telephone Company's Answering Brief, at pages 14 and 15, states that the California Public Utilities Commission considers and passes upon the reasonableness of the rules and regulations governing telephone service, that it has considered and approved the rule that the subscriber has no proprietary

right in the telephone number and argues that in the absence of an application to the Public Utilities Commission to pass upon the reasonableness and propriety of a rule and regulation, its reasonableness is conclusively established.

We do not dispute that, from time to time, the California Public Utilities Commission investigates the reasonableness of the rules and regulations of the Telephone Company respecting its service and that it may change or disapprove them. However, we do dispute the Telephone Company's citation of Crocker Hotel Co. v. Pacific Telephone & Telegraph Co., decision no. 35238 (1942), 44 C.R.C. 127, 128, as standing for the proposition that the California Public Utilities Commission has approved the Telephone Company's rule and regulation stating that the subscriber has no proprietary right in a telephone number. The quotation from that case which appears on page 14 of the Telephone Company's Answering Brief is incomplete, and, as such, is incorrect. In that case, the Public Utilities Commission was considering the above mentioned rule or regulation in conjunction with the rule and regulation which provides that reasonable changes in numbers and central office equipment may be made as the company's requirements demand. The case was one in which, during wartime, the Telephone Company's existing facilities for a particular exchange were overburdened and it became necessary for the Telephone Company to make changes in its central office equipment and

assign new numbers to telephone subscribers for the purpose of relieving the existing traffic congestion. The opinion notes that no formal hearing was held upon the complaint of the subscriber but, rather, conferences were held when, previously, the same matter was brought to the Commission's attention by informal complaint. The Commission held no further hearing in the cited case and took no new evidence. The decision states, at page 128:

> "The company's filed tariff rules provide that a patron obtains no proprietary right to a particular number assigned to his service connection and that reasonable changes in number and central office equipment may be made as the company's requirements demand. Similar rules are uniformly approved by state regulatory bodies and are essential to the maintenance of efficient service to telephone subscribers generally. <u>The rule itself is not challenged.</u> There is no indication that the proposed action of the company is arbitrary or capricious. It seems to be conceded that it is taken for the sole purpose of meeting exigencies arising from the greatly increased traffic demands that have arisen out of the impact of the war effort. . . ."
> (Emphasis added)

Clearly, the rule now questioned by the Receiver was not, as the above-quoted language indicates, challenged or at issue in the above-cited case. Nor, for that matter, was the Commission concerned with a question of telephone supersedure or the payment of past-due bills, but rather with wartime emergency traffic congestion.

The Telephone Company cites Morse v. Pacific Gas & Electric Co., 152 Cal. App. 2d 854, 314 P. 2d 192 (1957), for the proposition that absent a challenge of the specific rule to the Public Utilities Commission, the reasonableness thereof is conclusively established (Appellee's Ans. Br., p. 15). All that the Morse case stands for is the proposition that the Public Utility Commission's rules re disputed accounts control where the Public Utility Commission's jurisdiction is paramount (152 Cal. App. 2d 854 at 860). As noted in our Opening Brief, what is involved here is basically a disputed account, the payment of which the Telephone Company seeks to compel by its arbitrary rules relating to supersedure, the procedure for disputing bills before the Public Utilities Commission exclusively, and the rule saying that the telephone number is not property, (Appellant's Op. Br., pp. 34-40). As noted in those pages of our Opening Brief, the Bankruptcy Court is given exclusive and paramount jurisdiction to classify and adjudicate the claims of the creditors and may not surrender that jurisdiction to another court. By its own terms, therefore, the case of

Morse v. Pacific Gas & Electric Co. is inapplicable in the present case.

While we urge that a particular telephone number can have value and be "property" and that the Telephone Company's rules to the contrary are not applicable since they clearly conflict with the principles and purposes of the Bankruptcy Act and must, therefore, give way to the paramount jurisdiction of the Bankruptcy Court over the affairs of bankrupts, we do not suggest that these rules are not applicable to non-bankruptcy situations, absent affirmative action by the California Public Utilities Commission. Accordingly, the Telephone Company's fear that an adverse ruling in this case would impose upon it the odious task of keeping track of developed and developing rights in telephone numbers is unfounded (Appellee's Ans. Br., p. 15). In the normal, non-bankruptcy situation there would be no such problem, absent affirmative action by the California Public Utilities Commission. Then, certainly, the Telephone Company could not complain, except in a review to the California Supreme Court. In a bankruptcy situation the question would arise basically in operating cases where the trustee or receiver believes that the particular telephone number is of sufficient value to be classified as "property"; a question of fact to be determined in each instance by a court of law.

CONCLUSION

The Telephone Company's unreasonable and arbitrary rules must give way to the paramount jurisdiction of the Bankruptcy Court to enforce the principles and policies of the Bankruptcy Act to effect the rehabilitation of financially distressed debtors and to prevent preferential treatment among creditors.

Since the Telephone number is "property" and the telephone numbers in question were in the possession of the Debtor when its Chapter XI Petition was filed, the contested restraining order was issued properly, the decision of the District Court should be reversed and the Order of the Referee in Bankruptcy affirmed.

Respectfully submitted,

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By Nathan Markowitz

Attorneys for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Nathan Markowitz

NATHAN MARKOWITZ

No. 22342

In the

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,
Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellant Farmers Insurance Exchange

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FARMERS INSURANCE EXCHANGE,
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Appeal from the United States District Court
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Brief for Appellant Farmers Insurance Exchange

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

Appellant Farmers Insurance Exchange is an insurance exchange which is organized under the laws of the State of California, has its principal place of business in California and is a citizen of the State of California. Appellees Joe Rose, Jr. and Veronica Rose, his wife, are residents and citizens of the State of Arizona.

The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

The District Court had jurisdiction under the provisions of 28 U.S.C.A. § 1332. The judgment of the District Court was rendered by the United States District Court for the District of Arizona on July 28, 1967. Appellant has appealed from said judgment. This Court has jurisdiction upon this appeal to review the said judgment under the provisions of 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

(References made below, unless otherwise indicated, are to page numbers in the Transcript of Record.)

This is an action for declaratory judgment. The complaint describes the basic facts giving rise to the suit. (1) On or about January 10, 1964, appellant issued an automobile liability insurance policy to David Vassar. The policy provided for coverage in the amount of $50,000.00 for injuries suffered by one person, and $100,000.00 for injury sustained as a result of one accident. In his written application for said policy and in his oral communications to the representative of appellant at the time of his application for said policy, Mr. Vassar made certain statements and representations which were fraudulent and material to the acceptance of the risk and the hazard to be assumed by appellant. The appellant would not have issued the policy to Mr. Vassar if Mr. Vassar had not made such fraudulent misrepresentations. (Affidavit of Mr. White, Exhibit D to appellant's motion for summary judgment [50].) The primary, but not the sole, misrepresentation which Mr. Vassar made related to his driving record. Item 28 of the application form asked for details of all accidents and citations during the preceding three years, i.e., the three years prior to January 10, 1964. Vassar told the insurance agent that he had had only two accidents or citations during the pre-

ceding three-year period. (Deposition of Mr. Garfield, pp. 54-56.) The written application form actually signed by Vassar conveyed the same information. However, the application form actually signed by Mr. Vassar was lost. In any event, rather than the two citations in the preceding three years which Mr. Vassar revealed, or which were referred to in his written application, Mr. Vassar had in fact had seven citations in the preceding three years, five of which had been received in the preceding 13 months, of which four had been received within the preceding 5 months and 5 days. (See attachment to appellant's motion in limine [224].) Approximately two months and two weeks after Mr. Vassar was issued a policy and while driving the insured automobile, Mr. Vassar was involved in an automobile accident as a result of which appellees were injured.

In May, 1964, two months after this accident, appellant filed this lawsuit, asking the court to determine that, under the circumstances stated, the policy issued Vassar was void and no coverage was extended to him thereunder. Named as defendants in the action were appellees and Mr. Vassar, who was a party to the action before the District Court, but who is not an appellee hereunder.

After discovery procedures were utilized by appellant and appellees, both parties to this appeal at different times filed motions for summary judgment. There were separate briefs and arguments on each such motion and each was denied on the ground that there were disputed areas of fact. (124, 196.)

The Financial Responsibility Laws of the State of Arizona provide that the amount of automobile liability insurance required under said laws shall be $10,000.00 for injury to any person, and $20,000.00 for injuries arising out of a single accident.

On July 3, 1967, appellees filed their second motion for summary judgment. (269.) The issues were briefed and the motion was argued before the court on July 24, 1967, the day before the case was to be tried. Appellees' sole argument on this motion for summary judgment was that under the decision of the Arizona Supreme Court in *Sandoval v. Chenoweth,* ..... Ariz. ....., 428 P.2d 98 (1967), appellees were entitled to prevail on the declaratory judgment action as a matter of law. The District Court ruled in favor of the appellees on the day of the hearing on the motion and the case was not tried. Judgment was entered in favor of appellees. The judgment decreed that the liability of appellant on its policy became absolute as to appellees to the full extent of the policy limits of coverage upon the occurrence of appellees' injuries on March 24, 1964. (318.)

As a result of the foregoing, the following issues arise:

1. Under the laws of the State of Arizona, when an accident occurs, is an insurance company automatically precluded from asserting any policy defense, specifically including the defense of fraud in the procurement of the policy?

2. If the answer to the question just posed is in the affirmative, is the insurer precluded from asserting such a defense only to the extent of the required amount of coverage under the Financial Responsibility Laws of the State of Arizona, or is it precluded from asserting such defense at all, so that no policy defense is available to the full extent of the face amount of the policy?

SPECIFICATIONS OF ERROR

1. The District Court erred in Paragraph 1 of the judgment entered on July 28, 1967, by holding that the liability of Farmers Insurance Exchange under its policy of liability insurance issued to David R. Vassar became absolute as

to Joe Rose, Jr. and Veronica Rose, his wife, appellees, upon the occurrence of the injury to Mr. and Mrs. Rose on March 24, 1964.

2. The District Court erred in Paragraph 1 of the judgment entered on July 28, 1967, by holding that the liability of Farmers Insurance Exchange, appellant, under its policy of liability insurance became absolute in favor of Joe Rose, Jr. and Veronica Rose, his wife, to the full extent of the policy limits of coverage upon the occurrence of the injury to Mr. and Mrs. Rose on March 24, 1964.

3. The District Court erred in Paragraph 2 of the judgment entered on July 28, 1967, by awarding appellees their costs, because such award was inappropriate in view of the errors referred to in Paragraphs 1 and 2 above.

SUMMARY OF ARGUMENT

1. The District Court erred in Paragraph 1 of the judgment entered on July 28, 1967, by holding that the liability of appellant under its policy of liability insurance issued to David R. Vassar became absolute as to appellees upon the occurrence of the injury to appellees on March 24, 1964.

2. The District Court erred in Paragraph 1 of the judgment entered on July 28, 1967, by holding that the liability of appellant under its policy of liability insurance became absolute in favor of appellees to the full extent of the policy limits of coverage upon the occurrence of the injury to appellees on March 24, 1964.

ARGUMENT

Preamble

The judgment of the District Court was that under the decision of *Sandoval v. Chenoweth,* supra, the liability of an insurer becomes absolute upon the occurrence of any accident, that no policy defense, even for fraud in the procure-

ment of the policy, is available to the insurer as against an innocent third party once an accident has occurred, and that these principles are applicable to the full extent of the policy limits. The District Judge stated orally at the time of the hearing on appellees' motion that he was ruling as he ruled because of *Sandoval v. Chenoweth,* supra. Thus, the question at issue is whether under Arizona law, including *Sandoval v. Chenoweth,* supra, the judgment of the District Court was correct. This is not a case where the local judge has a peculiar feeling or awareness of the local law. This is the case where a judge was faced with the same state of the law faced by this Court when it decided *Weekes v. Atlantic,* 370 F.2d 264, on December 20, 1966, except for the *Sandoval* case.

The Arizona Supreme Court has not ruled on the issue which was before the District Court or which is presently before this Court. The decision of the District Court is not required or appropriate by virtue of the *Sandoval* case as the District Court believed. The decision of the District Court is directly contrary to the decision of this Court in *Weekes v. Atlantic,* supra, where this Court ruled that under an insurance policy with the exact language as is set forth in the policy involved in this case, the policy defense is available for any coverage in excess of the amount of liability coverage required by the Financial Responsibility Act. (See affidavit attached as Exhibit A to appellant's supplemental memorandum in response to motion for summary judgment [286] and policy attached thereto.)

The Jenkins and Sandoval Decisions

The District Court's ruling was based solely and expressly on *Sandoval v. Chenoweth,* supra. *Sandoval* is an outgrowth of *Jenkins v. Mayflower,* 93 Ariz. 287, 380 P.2d 145 (1963).

In *Jenkins* an insurer contended that there was no coverage due to a provision in the policy that by its terms made the policy inapplicable when a serviceman was driving the insured automobile. The Court denied the claim of exclusion from coverage on the ground that the omnibus clause required in a liability policy issued to comply with the Financial Responsibility Act was part of the motor vehicle policy by operation of law.

In *Sandoval* the Arizona Supreme Court held that an insured's failure to give his insurer notice of the filing of a lawsuit, which failure was a breach of a policy provision, does not defeat the right of a third party plaintiff to recover against the insurer. The decision in *Sandoval* was really on two points. The court reaffirmed its decision in *Jenkins*. It ruled that under the provisions of A. R. S. § 28-1170-F-1, no violation of the policy shall defeat or avoid it and that such provisions were controlling. The balance of the decision dealt somewhat succinctly with the question as to whether a policy defense was precluded to the extent of insurance coverage required by the Financial Responsibility Act or to the extent of full face amount of the policy.

In *Sandoval* the Arizona Supreme Court refers in depth to *Wildman v. Government Employees' Ins. Co.,* 48 Cal.2d 31, 307 P.2d 359, and to *Globe Indemnity Co. v. Universal Underwriters Insurance Co.,* 20 Cal.Rptr. 73, 201 Cal.App.2d 9. Neither of these cases involved statutory provisions such as we are concerned with here (i.e., provisions such as the provisions of the Arizona Financial Responsibility Act, including A. R. S. § 28-1170-B-F-G).

In *Wildman,* the Court was faced with a restrictive provision restricting coverage for a permissive driver. The Court held:

> "We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident

> which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in sections 402 and 415 of the vehicle code."

Section 402 of the Vehicle Code, now section 17150 of the Vehicle Code, simply provides that every owner of an automobile is liable to an injured person for injuries sustained as a result of the negligence of any permissive user.

Section 415 of the Vehicle Code, now section 16451 of the Vehicle Code, is a part of the financial responsibility law and requires that policies referred to under said laws cover permissive drivers. The court held, therefore, that the permissive driver provisions of sections 402 and 415 of the Vehicle Code were a part of the policy and therefore a permissive driver would be an insured under the terms of the policy and consequently covered to the full extent of the policy limits.

Likewise, in *Globe* the court was concerned with a permissive user exclusion. The court said:

> "Since appellants fail to sustain their first major position that the policy did not cover the permissive user we turn to the second basic argument that the trial court erred in affording Moore coverage to the full limits of the policy. We believe that Moore assumes the status of an insured under the policy and hence receives its whole protection. Moore thus becomes an additional insured under the policy and obtains its protection as much as the 'partner, employee, director or stockholder' who is specifically named in the policy's 'Definitions of Insured.' *Since the limitations of paragraph 8 do not affect the situation, and since the policy itself contains no differentiations as to those insured or the amounts of the protection, we find no basis for curtailment of Moore's coverage.*" (Emphasis added.)

The court went on to say:

"The policy contained this provision:

'"Financial Responsibility Laws. Such insurance as is afforded by this policy shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable *with respect to any such liability* arising out of the existence, ownership, maintenance or use of any automobile during the policy period, to the extent of the coverage and limits of liability [as] required by such law." (Italics added.)' (P. 433, 296 P.2d p. 807.) The court held that compliance with Vehicle Code section 415 did not work a reduction of the limits of the policy to the minimum which the section permitted. The court said 'Here we have the seemingly explicit provision of section 415 of the Vehicle Code that "A 'motor vehicle liability policy,' as used in this code means a policy * * *, which policy shall meet the following requirements: * * * (2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle * * * with the * * * permission of said assured," and coupled with that are the provisions of the Highway Carriers Act * * * declaring that the coverage provided "shall comply with the provisions of the motor vehicle financial responsibility law * * * which shall be applicable with respect to *any such liability* arising out of the existence * * * or use of any automobile * * * to the extent of the coverage and limits of liability required by such law." (Italics added.) That language cannot properly be construed to mean minimum coverage or minimum limits; rather, it must be interpreted as providing full or maximum coverage in both aspects insofar as encompassed by the law and not exceeding the clear limitations of the contract.' (P. 438, 296 P.2d p. 810.)

"As respondent points out, since the Universal policy did not set up different provisions for omnibus insureds, the fact that Mason, 'unlike Moore, became an

> omnibus insured through an interpretation of a policy definition' does not differentiate the cases. The point is that once Moore became an insured by operation of law, and once Mason became an assured by application of the policy, they both were protected to the full limits of the policy. We must reject, therefore, appellants' attempt to meet the impact of the decisional language by an assertion that it 'was ill considered and should not be followed.' Again, we find the Supreme Court language binding upon us and conclusive in its reasoning."

It is vital to note that it is clear from *Globe* that the full limits of coverage were deemed to be applicable because of the mandatory California statutes on permissive users. The court was not considering a situation where the question was the extent to which a policy defense such as fraud was barred. Further, there is no provision like A. R. S. § 28-1170F1 in the California Financial Responsibility Act and therefore there is no way of knowing which way the California courts would go if faced with the problems now before this Court. We wish to point forcefully to the fact that in *Globe* the Court clearly stated that, since the policy contained no differentiation as to those insured or the amounts of the protection, it could find no basis for curtailment of coverage. Implicit in this statement, of course, is the fact that if there were such provisions in the policy they would have been honored as they were honored by this Court in *Weekes v. Atlantic,* supra, and as they should be honored in this case.

Differences Between Jenkins and Sandoval and This Case

There are decisive differences between the laws applicable in *Jenkins* and *Sandoval* and the law applicable here, and the facts in *Jenkins* and *Sandoval* and the facts here.

The effect of the District Court's decision is contrary to and invalidates an express statute. No such step was taken or required by the Arizona Supreme Court in *Jenkins* or *Sandoval.*

A. R. S. § 20-1109 provides as follows:

> "All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy unless:
>
> 1. Fraudulent.
> 2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer.
> 3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise."

It should be kept in mind that to deprive the appellant in this case of a policy defense is to completely nullify and render void A. R. S. § 20-1109 in its application to automobile liability policies. The Arizona Supreme Court was not faced with such a statute in *Jenkins* or *Sandoval.* As a matter of general statutory construction, the fact that A. R. S. § 20-1109 was adopted subsequent to A. R. S. § 28-1170, on which appellees rely, makes it clear that the legislature intended that fraud would be available as a defense despite the provisions of the Financial Responsibility Act. Otherwise, they would have created an exception to A. R. S. § 20-1109.

In the absence of clear legislative intent to eliminate fraud as a defense such a construction is totally unjustified. In the case of *Virginia Farm Bureau Mutual Insurance Co. v. Saccio,* 133 S.E.2d 268 (Va. 1963), the insurer brought suit to establish that a policy was void from its inception since it had been issued in reliance upon the applicant's fraudulent misrepresentations. Virginia had a statute, Code § 38.1-336, quite similar to A. R. S. § 20-1109 authorizing an insurer to declare a contract void as a result of fraudulent misrepresentations. It was argued that the legislature in passing an assigned risk plan had created an exception to the "fraud statute". Refusing to find such an exception, the Court declared:

> "The right to rely on fraud as a defense should not be defeated in the absence of a clear showing that such was intended, either by legislative act or by the expressed intention or the course of conduct of the party entitled to so rely."

Indicative of the fact that a distinction should still be drawn in some instances between voluntary and nonvoluntary policies is the continuing California position, despite the strong statements of public policy quoted and relied upon by the Arizona court in *Jenkins* and *Sandoval,* that a California policy may be avoided for fraud in its procurement. See *Allstate Ins. Co. v. McCurry,* 36 Cal.Rptr. 731, District Court of Appeals, Div. 1, 1964; also *Civil Service Employees Ins. Co. v. Blake,* 53 Cal.Rptr. 701, District Court of Appeals, Div. 2, 1966. The latter case, decided in the fall of 1966, concludes as follows:

> "Appellants urge that the public policy favoring insurance coverage for all drivers is not achieved when a driver is left without coverage on the rescission of his policy for fraud. This is an argument for the legislature."

There Is an Express Decisive Policy Provision Before the Court in This Case Which Was Not Before the Court in Jenkins or Sandoval

The policy being construed in this case contains the following provision:

> "When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle responsibility law, such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of such law to the extent of the coverage and *limits of liability required by such law,* but in no event in excess of the limits of liability stated in this policy." (Emphasis added.)

There is no indication that there was any such provision in the policy being considered in *Sandoval v. Chenoweth,* 428 P.2d 98 (1967). Presumably if there were, it would have been the basis for a strong argument by counsel for the carrier and would have been discussed by the court.

The effect of such a provision has been very recently expressly considered by this Court in *Weekes v. Atlantic,* 370 F.2d 264. In that case the Court was considering whether or not an intoxication exclusion was valid. The Court there discussed in detail A. R. S. § 28-1170F1, on which appellees here rest their entire argument, in connection with a policy provision such as we have in this case. This Court said:

> "The Atlantic policy limits are $100,000/$300,000. The Financial Responsibility law provides, in pertinent part: A. R. S. 28-1170B:
>
> " 'The owner's policy of liability in-insurance must comply with the following requirements:
>
> . . .
>
> " '2. It shall insure the person named therein or any other person, as insured, using the motor vehi-

cle . . . with the express or implied permission of the named insured . . . subject to limits exclusive of interest and costs, with respect to each motor vehicle as follows:

" '(a) Ten thousand dollars because of bodily injury to or death of one person in any one accident.

" '(b) Subject to the limit for one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident.'

. . .

"A. R. S. 28-1170F:

. . .

" '1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs . . . [A]nd no violation of the policy shall defeat or void the policy.'

It is section 1170F which nullifies the 'intoxicants' exclusion.

"The law also provides:

A. R. S. 28-1170G:

" 'A policy which grants the coverage required for a motor vehicle liability policy may also grant lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and the excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants the excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.'

"The appealing parties find some conflict between the provisions of sections 1170B and 1170G and the provisions of section 1170F. We think that there is no conflict, and that section 1170F nullifies the exclusion only to the extent of the limits specified in section 28-1170B.

To us, section 28-1170G shows that this was the intent of the Arizona legislature. And there is nothing to the contrary in Atlantic's policy. It provides, with reference to State Financial Responsibility laws, as follows:

> "'When this policy is certified as proof of Financial Responsibility for the future under the provisions of the Motor Vehicle Financial Responsibility law of any state or province, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy.'

To us, this shows an intent, first, to afford the coverage required by the law, and second, to limit the amount of liability to that required by the law. The policy is thus wholly consistent with the law."

It should be noted that this language of this Court is consistent with the language of the California Court in the *Globe* case on which Sandoval is largely based.

The Matter of the Policy Defense Is Different

In deciding that an owner's policy of liability insurance is applicable no matter who is driving the vehicle (*Jenkins*), and that no act of the insured subsequent to the accident shall operate to defeat an injured party's opportunity to receive compensation (*Sandoval*), the Arizona Supreme Court was dealing with two problems entirely different in origin and in nature from the problem we have here: fraud in the procurement of the policy itself. It could be argued that *Jenkins* and *Sandoval* impose no substantial additional

burdens upon an insurer, since many states require an omnibus clause in all policies, and the insurer in *Sandoval* at least had notice of a claim against him. (Presumably, in *Sandoval,* had the insurer not been given any opportunity to set aside the default judgment, there would have been a denial of due process of law.) However, an insurer is substantially prejudiced, and given overwhelming new unbargained for and unexpected burdens when *all* of its policies are rendered absolute upon the occurrence of an accident. Such a construction would encourage fraud and deceit and would create a legal relationship so unfair and unreasonable as to be unconscionable.

Further, in this case the insurer is a party who has been intentionally wronged, which was not true in *Jenkins* or *Sandoval.*

The Policy Considerations at Play Are Different in This Case Than They Were in Jenkins or Sandoval

Another reason why we believe fraud is still available as a policy defense is because to accept the contrary argument could defeat the goals of the court as expressed in cases such as *Jenkins* and *Sandoval.* If fraud in the procurement of a policy is no longer available as a defense, presumably insurance companies would not insure parties until they had an opportunity to fully investigate them, which would probably mean that a number of people would be driving around during this interval with no coverage at all, rather than with the coverage they presently have upon execution of the application.

CONCLUSION

The District Court erred. It ruled as it did because of its interpretation of one case, *Sandoval v. Chenoweth.* The Court failed to take into account the basis for the *Sandoval*

decision and the substantial and decisive distinctions between the facts of that case and the facts of this case. The error is clear and the judgment below produced a clearly inequitable result. It should be reversed.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN J. O'CONNOR III

STATE OF ARIZONA
COUNTY OF MARICOPA—ss.

John J. O'Connor III, being first duly sworn, on oath deposes and says that on the 9 day of February, 1968, he mailed to James H. Green, Jr., Attorney for the Appellees, 32 Luhrs Arcade, Phoenix, Arizona, 85003, three copies of this Brief for Appellant Farmers Insurance Exchange.

JOHN J. O'CONNOR III

Subscribed and sworn to before me this 9 day of February, 1968.

Karen M. Bremer Burr

Notary Public

My Commission Expires:

My Commission Expires Oct. 19, 1968

No. 22342

In the

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,
Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellees
Joe Rose, Jr. and Veronica Rose, His Wife

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Brief for Appellees Joe Rose, Jr. and Veronica Rose, His Wife

---

APPELLEES STATEMENT OF THE CASE

On or about January 10, 1964, Mr. Peter Garfield was an automobile insurance agent employed by Appellant Farmers Insurance Exchange in Phoenix, Arizona. (Deposition of Mr. Garfield, May 27, 1966, page 4). On that date Mr. Garfield visited the office of David Vassar in Phoenix, Arizona, for the purpose of attempting to sell him automobile lia-

Vassar's name, Appellant issued two policies of insurance to Mr. Vassar effective as of January 10, 1964.

Appellees have denied, as has Mr. Vassar in the case prior to this appeal, that Mr. Vassar made any statements and representations that were fraudulent or material to the acceptance of the risk and hazard to be assumed by Appellant. It has also been contended by Appellees that Appellant knew from its own investigation that Mr. Vassar had received four citations in Arizona instead of two and that Appellant could have, in exercise of reasonable care, ascertained prior to the accident that Mr. Vassar had also received two citations in California and one additional citation in Arizona.

On or before January 29, 1964, the Appellant did conduct an investigation to determine for itself how many citations the insured David Vassar had received in the prior three year period. In spite of the fact that David Vassar had mentioned to Mr. Garfield that he had received citations in the State of California Appellant did not seek information at that time regarding prior citations from the Motor Vehicle Division of the State of California, but limited its inquiry to the Arizona Motor Vehicle Division. Had it obtained a report from California prior to March 24, 1964, Appellant could have ascertained that their records showed two citations received by Mr. Vassar within the prior three years.

Pursuant to its inquiry Appellant was informed prior to January 29, 1964, that the records of the Arizona Motor Vehicle Division showed that Mr. Vassar had received the following citations in the prior three year period: 1963—one citation; 1962—two citations; 1961—one citation.

Prior to January 29, 1964, the insurance file of Mr. Vassar was reviewed by Appellant and the discrepancy between the number of citations as shown by the application form prepared and signed by Mr. Garfield and the Motor Vehicle

Division report from Arizona was noted. Appellant then caused an additional investigation to be made of Mr. Vassar and it obtained a report upon him on or before February 18, 1964. The policies of Mr. Vassar were continued in force and effect and were not cancelled by Appellant. Appellant did not request any supplementary Arizona Motor Vehicle Report in spite of the fact that it knew there was a time lag between the date a citation was issued and the appearance of that fact on the records of the Motor Vehicle Division. Appellant could have ascertained prior to March 24, 1964, that the Arizona Motor Vehicle Division records showed one additional recent citation.

On March 24, 1964, while driving one of the automobiles insured by Appellant, David Vassar collided with a vehicle driven by Appellee Joseph Rose, Jr., and in which his wife Veronica Rose was a passenger.

On May 26, 1964, Appellant sent David Vassar a notice of cancellation of his said insurance policy to be effective as of April 11, 1964.

On May 26, 1964, Appellant filed his complaint in this action asking that the said insurance policy be declared void and that no coverage be extended to its insured David Vassar.

On October 9, 1964, Mr. and Mrs. Joseph Rose, Jr., filed in the Superior Court of Maricopa County, State of Arizona, an action No. 167161 against David Vassar and his wife. The said lawsuit proceeded to trial before a jury and a verdict was returned in favor of Mr. and Mrs. Rose and a judgment was entered by the Court on November 18, 1966, for Veronica Rose in the sum of $60,000.00 and Joseph Rose, Jr., in the amount of $15,000.00 and for both Plaintiffs in the amount of $1,000.00.

After the said judgment, on December 20, 1966, the Appellant paid Mrs. Rose, in partial payment and satisfac-

tion of the said judgment, the sum of $10,000.00 and paid Mr. Rose in partial payment and satisfaction of said judgment the sum of $8,250.00. Appellant had already theretofore paid the sum of $1,750.00 to another party who was injured in the same collision involving its insured David Vassar so that Appellant has now paid the total of $20,000.00 on the policy issued to David Vassar.

On May 25, 1967, the Supreme Court of the State of Arizona issued its opinion in *Sandoval v. Chenoweth,* 428 P.2d 98.

On July 3, 1967, Appellees moved for Summary Judgment and after argument Appellees' motion was granted and from the Summary Judgment of July 28, 1967, Appellant has taken this appeal.

APPELLEES' CONTENTIONS AND ARGUMENTS IN SUPPORT THEREOF REGARDING APPELLANT'S "SPECIFICATIONS OF ERROR".

With respect to Appellant's Specification Of Error No. 1 Appellees contend that:

A. The issue as to Appellant's liability, to the extent of the statutory required minimum insurance of $10,000.00 and $20,000.00 is moot and not in issue in view of the fact that Appellant has in actual fact paid the sum of $20,000.00 to the persons injured in the collision involving its insured, David Vassar.

This fact was pointed out in Appellant's Supplemental Memorandum of Points and Authorities filed in Support of their Second Motion for Summary Judgment and was uncontested.

The Appellant's motion in the lower court for Summary Judgment was, in the alternative, for "an order pursuant to Rule 56(d) and/or Rule 16 determining that Plaintiff is

in no event liable to Defendants, or any of them, as a result of the accident described in the Plaintiff's complaint for more than $10,000.00 for one injury to any one person or more than $20,000.00 for injuries sustained by all persons". This motion was heard and on September 16, 1966, was denied by a judge other than the judge who granted the motion of Appellees for Summary Judgment.

B. The Appellant, upon the facts of this case, was clearly liable at least to the extent of the statutory required minimum amounts of $10,000.00 and $20,000.00, even under the cases preceding *Sandoval v. Chenoweth,* 428 P.2d 98.

This contention is based upon the holdings and the language of the Arizona Supreme Court in:

Schecter v. Killingsworth, 93 Ariz. 273; 380 P.2d 136 (1963);

Jenkins v. Mayflower, 93 Ariz. 287, 380 P.2d 145 (1963);

Pacific Indemnity Co. v. Hamman Wholesale Lumber and Supply Co., Inc., 95 Ariz. 362, 390 P.2d 897 (1964).

With respect to all three of Appellant's Specifications Of Errors it is contended that:

A. Under the facts of this case and in view of the decision of the Arizona Supreme Court in *Sandoval v. Chenoweth,* supra, the U. S. District Court did not err in granting Appellees' Motion for Summary Judgment herein.

Appellees base their argument in support of this contention upon the decision of the Arizona Supreme Court in the *Sandoval v. Chenoweth* case, supra, and the Arizona Supreme Court decisions in the other cited cases which provide the background and show the direction of the Arizona Supreme Court on this subject.

The cases cited by Appellant in its argument are not in

point here in that they either do not interpret the law of the State of Arizona or they were decided prior to the *Sandoval* case, supra.

It is interesting to note that the attorney for Appellant in his memorandum of law filed on August 9, 1966, in support of his motion for Summary Judgment cited *Sandoval v. Chenoweth,* 2 Ariz. App. 553, 410 P.2d 671, which was the decision in the case by the Arizona Court of Appeals. The Court of Appeals decision was quoted by Appellant's attorney as saying:

> "We agree with Financial Indemnity Co. that the Financial Responsibility Act of the State of Arizona does not abrogate the policy defense of failure of the insured to give notice of the filing of a lawsuit to the insurance carrier. The policy involved is a voluntary policy. The policy was not issued to the insured to satisfy his proof of financial responsibility. The policy defense of notice of a lawsuit is one which the insurance company may properly assert after the accident to defeat liability. It is our opinion that the Arizona Supreme Court case of *Jenkins v. Mayflower Ins. Exch.,* 93 Ariz. 287, 380 P.2d 145 (1963), should not be extended to include the situation in the case at bar."

The issue was therefore squarely before the Arizona Supreme Court on the appeal from the decision of the Arizona Court of Appeals.

It is respectfully submitted that the Arizona Supreme Court in its pre-*Sandoval,* supra, decisions on this issue had stated clearly that A.R.S. 28-1170 F meant what it said. It is submitted that it reiterated that once again in the *Sandoval* decision, and went beyond the prior decisions to say that the liability which became absolute when injury occurred was applicable to the full extent of the liability insurance policy limits and was not limited to the statutory required minimum amounts.

It should be kept in mind that when it decided the case of *Sandoval v. Chenoweth,* supra, the Arizona Supreme Court had had the opportunity of seeing and considering the decision of this Court in *Weekes v. Atlantic,* 370 F.2d 264 (1966), which was decided earlier.

In *State Farm Mutual Automobile Insurance Co. v. Thompson,* 372 F.2d 256 (Jan. 24, 1967) this Court said at page 260:

> "However, in Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145, it was held that the omnibus clause in A.R.S. 28-1170, subsec. B., par. 2, is to be considered a part of every insurance policy issued in the State of Arizona and that an insurer cannot limit its liability contrary to its terms. In so ruling, the Supreme Court of Arizona refused to distinguish between voluntary and certified policies of insurance in applying the mandatory omnibus clause. Under this ruling, which is binding upon us, the provisions of A.R.S. 28-1170, subsec. F must be considered a part of the policy involved in this case." . . .

The Court at page 261 said of the *Mayflower* decision:

> "Needless to say, we must accept the 'Mayflower' pronouncement as long as it states the law of Arizona, and may not inquire as to its correctness. If 'Mayflower' is to be overruled it must be by the Supreme Court of Arizona."

Surely the decision in the *Sandoval* case is entitled to the same treatment by this court as the *Mayflower* case.

CONCLUSION

Appellees respectfully submit that in the *Sandoval v. Chenoweth* case, supra, the Arizona Supreme Court has held that under Arizona law when:

1. A policy of liability insurance is issued covering the owner or operator of a Motor Vehicle, AND

2. Injury or damage covered by the said policy occurs, THEN

A. The liability of the insurance carrier becomes absolute and can not be cancelled or annulled, AND

B. The insurer is liable to the full extent of the policy limits.

We submit that the U. S. District Court Judge properly applied the Arizona law as announced in the *Sandoval* case, supra, to the facts of this case and properly granted Appellees' Motion for Summary Judgment.

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Attorney for Appellees

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES H. GREEN, JR.

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Reply Brief for Appellant Farmers Insurance Exchange

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RESPONSE TO APPELLEES' STATEMENT OF THE CASE

Appellees' "Statement of the Case" is a five page narrative statement which fails to set forth or discuss facts relating to the sole question to be resolved on this appeal: whether an automobile liability insurance carrier, under the laws of the State of Arizona, is deprived of a policy defense of fraud and deprived of such defense to the full extent of the policy limits.

Rather than discussing such matters, appellees describe a series of admittedly disputed factual questions and a series of facts which relate to issues which were not considered by

the District Court because of its conclusion that no policy defense was available to appellant as a matter of law. If the District Court erred in this conclusion, then obviously this case must be returned to the District Court so it can decide the disputed fact questions and hear the evidence concerning and rule on the legal significance of the other defenses which appellees have advanced in response to appellant's claim in this action.

RESPONSE TO APPELLEES' CONTENTIONS AND ARGUMENTS IN SUPPORT THEREOF REGARDING APPELLANT'S "SPECIFICATIONS OF ERROR"

As appellees state, appellant has paid a total of Twenty Thousand Dollars ($20,000.00) as a result of the subject accident. Of this amount, $10,000.00 has been paid to Mrs. Rose and $8,250.00 has been paid to Mr. Rose. Appellant agrees that the question as to whether it was obliged to pay said sums is moot. However, the question as to whether appellant's policy "became absolute" as to the appellees upon the occurrence of the accident, as is set forth in the judgment, is a necessary issue to be resolved on this appeal.

Appellees have refused to discuss the sole issue in this lawsuit. They simply cite *Sandoval v. Chenoweth,* 428 P.2d 98, and stand silently and hopefully. Aside from citing *Sandoval,* which they never discuss, and citing *Schecter v. Killingsworth,* 93 Ariz. 273, 380 P.2d 136 (1963), *Jenkins v. Mayflower,* 93 Ariz. 287, 380 P.2d 145 (1963), and *Pacific Indemnity Co. v. Hamman Wholesale Lumber and Supply Co., Inc.,* 95 Ariz. 362, 390 P.2d 897 (1964), as authority for the proposition that all policy defenses are abolished up to the required minimum amounts, the only case cited is *State Farm Mutual Automobile Ins. Co. v. Thompson,* 372 F.2d 256 (9th Cir. 1967).

In that case there was a judgment against the alleged insured for $32,658.50. The company denied coverage, claiming the defendant was not an additional insured. This court affirmed the ruling of the District Court that the defendant was not an additional insured. The policy was a $10,000.00/$20,000.00 policy. The insurance company was sued for $10,158.50. The District Court granted plaintiff's motion for summary judgment and entered judgment for the plaintiff in the sum of $5,000.00 plus interest. In awarding a judgment for $5,000.00 instead of the policy limit of $10,000.00 the District Court accepted the company's view that if the defense of noncooperation is precluded by A. R. S. § 28-117OF, it was precluded only as to the first $5,000.00 of the policy of insurance which was the minimum amount of coverage required by the Arizona Financial Responsibility Law. This court affirmed that decision. This case supports appellant's position and is of no comfort to appellees.

Appellees' brief is primarily striking in that it fails to discuss what appellant has argued, the real issues before this court in this case. Specifically, it does not discuss (1) the fact that we have a statute in this case (A. R. S. § 20-1109) which the Arizona Supreme Court was not concerned with in any other cases it has decided in this area of the law, (2) the significance of the language we have in the policy before the court in this case, which language was not before the Arizona Supreme Court in any of the cases decided by it, and (3) the fact that the policy considerations at play in a fraud case differ substantially from those at play in the usual case. Appellant has already stated its position on these matters in depth. It would serve no useful purpose to repeat here what we have said on these points in our opening brief.

CONCLUSION

We can only state by way of conclusion what we stated in our opening brief. The District Court erred. It ruled as it did because of its interpretation of one case, *Sandoval v. Chenoweth.* The court failed to take into account the basis for the *Sandoval* decision and the substantial and decisive distinctions between the facts of that case and the facts of this case. The error is clear and the judgment below produced a clearly inequitable result. It should be reversed.

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Attorneys for the Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN J. O'CONNOR III

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Appellant,

v.

HJALMAR B. LANDOE, FRANCIS I. SABO, and EDWIN B. PEGRAM,

Appellees,

OPENING BRIEF OF APPELLANT,
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Appellees.

OPENING BRIEF OF APPELLANT, ANGUS J. DE PINTO

(For convenience, the individual parties will be referred to by their last names. Provident Security Life Insurance Company will be referred to as "Provident". United Security Life will be referred to as "United". American Security Investment Company will be referred to as "American". "T.R." refers to Transcript of Record; "R.T." refers to Reporter's Transcript.)

Jurisdiction

This action originated in the United States District

action. Jurisdiction was based on 28 U.S.C.A. Sec. 1332. From adverse judgments upon his cross-claim against his co-defendants, Sabo, Pegram and Landoe, DePinto instituted this appeal pursuant to Rule 73 of the Federal Rules of Civil Procedure. 28 U.S.C.A. Sec. 1291 grants to this Court jurisdiction to review the judgments of the lower court.

Statement of the Case

This action was instituted by one John S. Gorsuch again DePinto, Sabo, Pegram, Landoe and others, for the purpose of recovering, among other things, the value of assets of United which had been transferred by it to American on or about October 18, 1957, in exchange for 30,800 shares of American's stock. The history of the litigation is found in the opinions of this Court: Niesz v. Gorsuch, 295 F.2d 909; DePinto v. Provident Security Life Ins. Co., 323 F.2d 826; and DePinto v. Provident Security Life Ins. Co., 374 F.2d 37.

After the first appeal, new parties entered the case and new pleadings were filed, including a cross-claim by DePinto against his co-defendants, James D. Kelly, L. N. Kelly, American Security Investment Company, Roslyn B. Croydon, Vernon B. Niesz, John D. Ballantyne, Edwin B. Pegram, Francis I. Sabo, Hjalmar B. Landoe and United Finance Corporation. (T.R. 22) The cross-claim alleged:

> "The loss or damage to United Security Life as alleged in plaintiff's Complaint was proximately, directly and primarily caused by the wrongful, willful and inten-

and was not aware that such acts were contemplated or intended. Any liability of cross-claimant for the alleged loss or damage to United Security Life (which Cross-claimant denies) is vicarious or secondary as compared with the primary liability of cross-defendants."

After the second appeal, the trial Court entered an order severing the cause as to the remaining defendants, Sabo, Pegram and Landoe, and ordered that the case would proceed to trial against DePinto as the sole defendant. (T.R. 183) After trial, judgment was rendered against DePinto and in favor of Provident in the amount of $314,794.19. (T.R. 184) Upon a third appeal, this judgment was affirmed. Thereafter, DePinto moved that his cross-claim be set for trial. (T.R. 189) Landoe then filed a Motion for Summary Judgment on the cross-claim, which was followed by a similar motion on behalf of Sabo and Pegram. (T.R. 128, 136) These motions were granted and judgments were entered dismissing DePinto's cross-claim as to the defendants Sabo, Landoe and Pegram. (T.R. 139-143) With reference to such judgments, and on August 31, 1967, the trial Court entered an order reading:

"The Court has found there is no just reason for delay and hereby makes express determination thereof. It is so ordered and the orders and judgments above referred to shall be final and not subject to revision pursuant to F.R.C. P. 54(b). It is

> further hereby ordered that each of the orders and judgments above referred to shall be deemed amended to include the express determination as hereinabove provided." (T.R. 150)

On September 18, 1967, DePinto filed his amended Notice of Appeal from the judgments dismissing his cross-claim as to the defendants Landoe, Sabo and Pegram and the order entered on August 31, 1967. (T.R. 151)

Questions

The questions involved in this appeal are as follows:

1. Does an order dismissing a cross-claim (and upon which no judgment is entered) become the law of the case and res judicata, where the judgment entered on plaintiff's complaint is reversed and where the appellate court decides that it will not be necessary to discuss the questions raised by the cross-claim until there have been further proceedings in the trial Court?

2. Does the record herein disclose that there is no genuine issue as to any material fact and that, as a matter of law, DePinto was not secondarily liable for the loss sustained by United as the result of the transfer of its assets to American, as compared to the primary liability of Sabo, Pegram and Landoe and that, therefore, DePinto is not entitled to indemnity from Sabo, Pegram and Landoe?

Specification of Error

The trial Court erred in granting the motions of Sabo, Pegram and Landoe for summary judgment and in entering judgments dismissing DePinto's cross-claim as to them for the reason that:

(a) The pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits (testimony taken at the trial), do not show that there is no genuine issue as to any material fact and that Sabo, Pegram and Landoe were entitled to judgment as a matter of law.

(b) The action of the trial Court in previously dismissing the cross-claim was not res judicata, or the law of the case.

(c) Under the law of the State of Arizona, DePinto, as a party secondarily liable, is entitled to indemnity from Sabo, Pegram and Landoe as the parties primarily liable for the loss sustained by United as a result of the transaction of October 18, 1957.

Argument

1. DePinto's Crossclaim Not Foreclosed by Prior Proceedings.

In granting the motions of Sabo, Pegram and Landoe for summary judgment on DePinto's cross-claim, the trial Court pointed out that an order dismissing the cross-claim had been entered prior to the second appeal; that DePinto had assigned such ruling as error; that the ruling was not held erroneous by the Court of Appeals, although the judgment appealed from was reversed on other grounds and new trial ordered, and that, therefore, the dismissal of DePinto's cross-claim "has become the law of the case and is

res adjudicata." (T.R. 140, 142) Apparently, the trial Court relied upon the statement of Professor Moore in 1B J. Moore, Federal Practice, at 2231, reading:

> "A judgment may, however, be reversed by an appellate court on a single ground, and remanded with other determinations of the trial court left intact. In such a case, the unreversed determinations of the trial court are generally adhered to on remand; but this is an application of the doctrine of law of the case, rather than res judicata or collateral estoppel."

The trial Court completely overlooked the fact that in its opinion this Court did not leave "intact" numerous rulings of the trial Court which were attacked upon the appeal. This Court stated, commencing at page 838 of 323 F.2d:

> "There are also certain other questions presented on this appeal.[31] But they are not of a kind which requires decision now in order to provide guidance as to the remanded proceedings. Nor will they be presented here again unless plaintiff prevails in the further proceedings and then only if the judgment is of the same kind as that which is before us on this appeal. If these questions do arise again, they can best be dealt with on the record for that appeal."

"[31] We refer to the questions of whether the judgment is excessive as to DePinto and Duhame to the extent of 38.79% because of the cancellation of American's stock held by United; whether the judgment is excessive as to DePinto in the amount of six per cent because of Duhame's ownership of certificates of contingent interest; whether Provident is entitled to six per cent interest on the award from October 18, 1957; and whether DePinto and Duhame are entitled to indemnity against Pegram, Sabo, Landoe and certain other defendants."

In the light of the above-quoted statement, it is quite clear that this Court had no intention of foreclosing the issue raised by DePinto's cross-claim.

2. Record Does Not Support Summary Judgment.

In granting the motions for summary judgment, the trial Court stated:

"The court is fully satisfied the above-quoted ruling (the previous order granting the motion to dismiss the counter-claim) was sound under Arizona law and the facts shown of record at the time it was made. Any conceivable doubt has been removed by the issues as stated in the pre-trial order, the jury instructions, the

as to defendant DePinto's liability to plaintiffs. The appellate opinion affirming that judgment makes it clear beyond question." (T.R. 140)

No doubt the trial Judge felt that his decision with respect to DePinto's claim for indemnity was supported by the opinion of this Court in DePinto v. Provident Security Life Ins. Co., 374 F.2d 37 (9 Cir. 1967), reading, in part:

"Late on the afternoon of October 17, 1957, American was organized, with Sabo, Pegram, Landoe, Roslyn B. Croydon, John D. Ballantyne and Niesz as the incorporators and directors. On October 18, 1957, Kelly agreed in writing to sell 35,149.89 shares of United stock to American for $325,136.48. At 3:30 p.m. that afternoon, a meeting of the board of directors of American was held. The minutes of that meeting recite that Croydon reported that negotiations had been completed for the acquisition of approximately forty percent of the shares of United, 'representing working control,' to be paid for partly in cash and partly in assets which could be acquired from United in payment of Class A shares of American.

"The directors of American thereupon adopted the four resolutions noted in the margin.[3] As indicated by these resolutions, American had arranged to sell to United 35,000 Class A common shares of American stock. The resolutions by American also indicate that in part payment for the 35,149.89 shares of United which Kelly was selling to American, Kelly was to receive the assets of United which American had acquired in payment for American stock.

"A meeting of the board of directors of United was held at 4:00 p.m. on October 18, 1957. At that meeting, with directors DePinto, N. J. Dunn and J. L. Jenkins in attendance, a resolution was adopted accepting the resignations of A. Thomas Duncan, Patrick J. Kelly, E. Hartley Brown, T. J. Flaherty and Spence Reese, as directors of United. This resolution further provided that Niesz, Ballantyne, Croydon, Sabo, Pegram and Harvey T. Goss be elected as directors of United.

"A second meeting of United's directors was held at 4:15 p.m. on that day, with only four of the directors (Niesz, Ballantyne, Croydon and Goss) in attendance. Three of these (Niesz, Ballantyne and Croydon) were

in American's board meeting held at 3:30 p.m. earlier that afternoon.

"The minutes of the 4:15 p.m. meeting of United first recite that Dunn, Jenkins and DePinto had previously tendered their resignations as directors, and record the adoption of a motion accepting these resignations. According to the minutes, two resolutions were then adopted, the effect of which was to subscribe for 35,000 shares of Class A common shares of American at ten dollars per share. All but 4,200 of these shares were to be purchased immediately for a total consideration of $308,000, consisting of United's secured and unsecured promissory notes, bonds, certificates of deposit and cash.

"On the day these transactions took place, American did not have a permit from the Securities Division of the Arizona Corporation Commission authorizing the issuance of shares of its non-voting common stock to United. At this time both Kelly and Croydon knew that Kelly was to be paid with $308,000 in assets of United for his sale to American of his stock in United. United was in a deficit condition on October 17, 1957. The 30,800

on October 18, 1957, apparently had no fair market value, which resulted in increasing United's existing deficit by $308,000.

* * * *

"The jury verdict represents a finding that a proximate cause of United's loss on October 18, 1957, was DePinto's negligence in failing to keep himself informed concerning United's affairs, in failing to determine whether the new group would obtain control of United in a manner which would prejudice that company, and in failing to take effective action to thwart the plan which, upon a reasonable investigation, would have been shown to be contrary to the best interests of United."

This Court decided that the jury was warranted in finding that DePinto's negligence was a proximate cause of the loss sustained by United as a result of the October 18, 1957 transaction. The trial Court was quick to conclude that such negligence must give rise to primary liability. This is not the rule.

The landmark Arizona decision is the case of Busy Bee Buffet v. Ferrell, 82 Ariz. 192, 310 P.2d 817. The Busy Bee Buffet, a corporation, operated a bar on the West side of certain premises and leased the East side to a partnership for the purpose of operating a restaurant thereon. A passageway at the

rear of the premises was used by both the buffet and the restaurant for the delivery of groceries to the restaurant and liquor to the buffet. A trapdoor was situated in the passageway and led to a basement used by both the restaurant and the buffet. One of the partners left the trapdoor open and, while attempting to make a delivery of beer to the buffet, the plaintiff, Ferrell, fell through the trapdoor and was injured. Ferrell obtained a judgment against both the corporation and the partnership and, at the same time, the corporation was given judgment for a like amount against the partnership. In discussing the liability of the corporation to Ferrell, the Supreme Court of Arizona said:

> "Under such circumstances the very existence of the trap door (without adequate guard rails or warnings of some kind), and the certainty that it would be open at times, constituted a potential danger at all times and an actual danger when open and unguarded. Therefore, the Buffet owed the duty to its invitees to adequately warn them of the existence and nature of such potential or actual danger. This it did not do. In addition to the testimony of Ferrell two witnesses testified they had delivered liquors through that passageway for a long period of time prior to Ferrell's injury and did not know that the wooden

covering lying across the concrete passageway was a trap door, or that there was a basement beneath it. All of the evidence is to the effect that the passageway was dimly lighted at the point where the trap door is located. We therefore hold that the court did not err in denying the Buffet's motion for judgment n.o.v. or, in the alternative, for a new trial."

In discussing the question of whether or not the corporation was entitled to indemnity from the partnership, the Supreme Court of Arizona said:

"We have shown above that the Buffet was guilty of negligence in failing to maintain the passageway in a reasonably safe condition for those making deliveries to it. We believe we should now discuss briefly the difference between the character and kind of <u>negligence</u> of the Buffet and that of Pastis. The term 'difference in kind and character' between the negligence of the Buffet and Pastis must not be confused with 'comparative negligence' or 'degrees of negligence.'

"It will be observed that the Buffet owed a positive legal duty to Ferrell to

keep the passageway reasonably safe for his use in making deliveries of beverages to it. So long however as the trap door was closed the basement beneath the passageway constituted no actual peril whatever. It was only when the trap door was open and inadequately guarded by failure to place proper barricades on each side of the opening, or something equally effective, that the actual danger to Ferrell was created. The Buffet was guilty of no active fault in creating the danger to Ferrell. Its negligence was passive or static. Its negligence was incapable of producing injury to any one at that time except through the active negligence of another. Pastis, in opening the trap door and leaving it unguarded, was the immediate cause of Ferrell falling through the opening and sustaining the injuries which form the basis of this litigation.

"It will be further observed that the liability of the Buffet to Ferrell is based upon an entirely different kind or character of wrong than that of Pastis. The liability of the Buffet is based upon its positive legal

duty to Ferrell to maintain the passageway in a reasonably safe condition for his use. It did not actively participate in the wrong which was the immediate cause of the injury to Ferrell. It was Pastis, a co-tenant with the Buffet, who, acting independently and without the knowledge of the Buffet, primarily caused the injury to Ferrell. It was his act in opening the trap door to the basement and leaving it unguarded which rendered the passageway unsafe for the use of Ferrell. His act did more than render it unsafe, it rendered it highly dangerous. It constituted gross and wilful negligence for which he was liable to Ferrell either as an invitee or a licensee. There was no dispute in the evidence on this point and reasonable men could draw no other inference from his act. Scott v. Scott, 75 Ariz. 116, 252 P.2d 571.

"In the light of these facts Pastis became primarily liable to Ferrell for the injuries he sustained and the Buffet is only secondarily liable. Blakely Oil Co. v. Crowder Cattle Co., 80 Ariz. 72, 292 P.2d 842; Builders Supply Co. v. McCabe,

366 Pa. 322, 77 A.2d 368, 24 A.L.R.2d 319, 323, 324; Fidelity & Casualty Co. of New York v. Federal Express, 6 Cir., 136 F.2d 35, 40. In the latter case the court points out the different factual situations in which the issue of primary and secondary liability may arise as between joint tort-feasors. It reads as follows:

> "'From the cases and authorities to which reference has been heretofore made, the rule has been variously expressed that, as between joint tort-feasors, the issue of primary and secondary liability only arises: where they are not in pari delicto as between themselves; where one tort-feasor is not guilty of the same fault as the other, although both are liable to the injured party; where the negligence of the joint tort-feasors is not of the same character; where they do not commit the same wrong; where one is not a wrongdoer as between himself and the other; where there is no joint action in causing the injury; where they do not act together in committing the wrongful act; where one is not guilty

> of the same tortious delinquency; where the negligence of one is only imputed or constructive; where one is liable by construction of law on account of some omission of a duty of protection or care; and where one tort-feasor is liable to a third party by reason of a legal relationship to the other tort-feasor, or because of a condition brought about by the latter, in the creation of which the other has not joined. It is also said that where one is the "active" tort-feasor, and the other, the "passive"--or where the primary or active fault rests upon one tort-feasor, he, as the active tort-feasor, is liable to the other. But this is only another way of expressing the same rule as otherwise above stated. It does not mean that the joint tort-feasor whose negligence is the lesser can have indemnity from the other for damages caused by the concurring negligent act of both.'
>
> "We hold the facts in the instant case fall squarely within the above category of joint torts creating a primary and secondary liability."

In the case of Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849 (9 Cir. 1961), this Court adverted to the right of a

"Defendant was referring to the doctrine recognized by this court in United States v. Rothschild Intern. Stev. Co., 9 Cir. 1950, 183 F.2d 181. This right of indemnity exists in Arizona; Busy Bee Buffet v. Ferrell, 1957, 82 Ariz. 192, 310 P.2d 817. We, of course, express no opinion whether defendant's claim met these requirements or was valid."

It cannot reasonably be disputed that Sabo, Pegram and Landoe were primarily liable for the loss sustained by United as the result of the October 18, 1957 transaction. They were incorporators and directors of American. (T.R. 44) Sabo and Pegram were directors of United. (T.R. 52) It was their conduct which caused United to transfer $314,794.19 of its assets to American in exchange for the 30,800 shares of the common stock of American. As pointed out by this Court:

"On the day these transactions took place, American did not have a permit from the Securities Division of the Arizona Corporation Commission authorizing the issuance of shares of its non-voting common stock to United."

This was illegal. A.R.S. § 44-1841, et seq. Furthermore, as stated by the trial Judge in his instructions to the jury, "The act of United in purchasing the American stock was illegal." (T.R. 584-586) See A.R.S. §§ 20-532, 20-538 and 20-546.

It is undisputed that DePinto was not a director of United at the time of the commission of acts by Sabo, Pegram and Landoe which resulted in loss to United. He did not participate

in, acquiesce in, ratify, authorize, have knowledge of, or have anything whatsoever to do with the exchange of United's assets for stock in American. As pointed out by this Court, DePinto's only negligence was his failure to do anything with respect to the transaction of October 18, 1957. Having in mind the Busy Bee Buffet case and, particularly, the quote from Fidelity and Casualty Co. of New York v. Federal Express, it is clear that, with respect to the relationship of DePinto with the cross-defendants:

(a) they were not in pari delicto;

(b) DePinto was not guilty of the same fault;

(c) the negligence of DePinto was not of the same character;

(d) they did not commit the same wrong;

(e) DePinto was not a wrongdoer as between himself and the others;

(f) there was no joint action in causing injury;

(g) DePinto did not act with the others in committing a wrongful act;

(h) DePinto was not guilty of the same tortious delinquency;

(i) the negligence of DePinto was passive, while the negligence of the others was active.

The liability of DePinto for the loss to United is secondary. The liability of Sabo, Pegram and Landoe for the loss to United is primary. Under the law of Arizona, DePinto is entitled to indemnity from Sabo, Pegram and Landoe. The judgments in favor

of Sabo, Pegram and Landoe must be reversed and DePinto allowed to proceed upon his cross-claim

Respectfully submitted,

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By _____
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Angus J. DePinto

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

_____
Joseph S. Jenckes, Jr.

A true copy of the foregoing Opening Brief of Appellant, Angus J. DePinto served, via First Class Airmail, postage prepaid, this 15th day of February, 1968, upon:

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NO. 22343

In The

UNITED STATES COURT OF APPEALS

For The Ninth Circuit

ANGUS J. DE PINTO,

Appellant,

v.

HJALMAR B. LANDOE, FRANCIS I. SABO, and EDWIN B. PEGRAM,

Appellees.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

In response to our Opening Brief, appellees advanced the premise that where tortfeasor A is primarily liable to plaintiff for negligence, he cannot recover indemnity from joint tortfeasor B. They point out that this Court held (now res judicata) that the jury was warranted in finding that DePinto's abdication of his duties as a director of United constituted negligence proximately causing, or contributing to, the loss sustained by United as a result of the October 18, 1957 transaction. Appellees then draw the conclusion that because DePinto's negligence proximately

caused the loss to United, he must be deemed to be "primarily" liable, and therefore, precluded from seeking indemnity.

The basic fault in appellees' argument lies in the premise--the equating of negligence with primary liability. It is true that the right to indemnity is enjoyed only by a tortfeasor who is "secondarily" liable; but liability based upon negligence--neglect of duty--often (and in this case) gives rise to "secondary" liability. In the case of Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368, 24 A.L.R.2d 319, which was cited by the Supreme Court of Arizona in both the Blakely Oil[1] and Busy Bee[2] cases, the Supreme Court of Pennsylvania stated:

> "Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of the failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible." (Emphasis supplied.)

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[1] 292 P.2d 842

[2] 82 Ariz. 192, 310 P.2d 817

In Busy Bee, the Supreme Court of Arizona held that the buffet was liable to the plaintiff because it "was guilty of negligence in failing to maintain the passageway in a reasonably safe condition for those making deliveries to it." The Court pointed out, however, that "the buffet was guilty of no active fault in creating the danger to Ferrell. Its negligence was passive or static. Its negligence was incapable of producing injury to anyone at that time except through the active negligence of another." The buffet was allowed indemnity from its joint tortfeasor because its liability, though based on negligence--was secondary. That is the situation here. DePinto had a fiduciary duty as a director to "discover or correct or remedy a dangerous condition caused by the act of the one (appellees) primarily responsible." His negligence in failing to pay any attention to the affairs of United was "passive or static". His negligence "was incapable of producing injury to anyone at that time except through the active negligence of another (appellees)."

Let us assume that the cashier of a bank consistently neglected to have any audits made of the books with the result that one of the bank's employees was able to embezzle a million dollars over the period of the cashier's neglect. Would anyone suggest that when the negligent cashier was required to make good the loss, he could not seek indemnity from the embezzler? Does DePinto's position

here differ from that of the negligent cashier? The specific rule applicable to this situation is found in the A.L.I. Restatement, Restitution 413 § 94:

> "A person who has become liable in tort to another because of an injury caused by his negligent failure to protect the other's person or property from the tortious conduct of a third person is entitled to indemnity from such third person for expenditures properly made in the discharge of such liability, if the payor could have recovered from the third person for an injury so caused to himself or to his own property.
>
> "Comment:
>
> "a. The rule stated in this Section is applicable to situations in which, because of the relation of two parties, one of them is under a duty of protecting the other or the interests of the other from harm. Thus the rule is applicable to a trustee, agent, bailee or other fiduciary liable to the beneficiary or bailor because of his negligence in failing to protect the subject matter from intentional harm done by a third person or from trespass or conversion committed by mistake. It applies likewise to a carrier who is under a duty to protect passengers from assaults and acts of others. In such cases the fact that the claimant committed a breach of duty to the injured person does not bar him from maintaining a tort claim against the person doing the harm or from a right to restitution from such person."

DePinto became liable in tort to United because of an injury caused by his negligent failure to protect United's property from the tortious conduct of appellees. He is entitled to indemnity from appellees for expenditures properly

made by him in the discharge of such liability. The judgment of the lower court must be reversed.

Respectfully submitted,

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EVANS, KITCHEL & JENCKES

By _____
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Attorneys for Appellant, Angus J. DePinto

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

_____
Joseph S. Jenckes, Jr.

A true copy of the foregoing Appellant's Reply Brief served, via First Class Airmail, postage prepaid, this 9th day of April, 1968, upon:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 2 1960

ALFRED MELVIN FELDSTEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 17344

FILED

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED MELVIN FELDSTEIN, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	)	NO. 22344

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED MELVIN FELDSTEIN, Appellant,	)	
vs.	)	NO. 22344
UNITED STATES OF AMERICA, Appellee.	)	

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in Counts One, Two, and Three of a five-count indictment following trial by jury. [C.T. 63][1]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176(a). Jurisdiction of this

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[1] "C.T." refers to Clerk's Transcript.

rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in three counts of a five-count indictment [C.T. 2-6]. The first count alleged that appellant, with intent to defraud the United States, aided and abetted the smuggling of 130 pounds of marihuana into the United States from Mexico, by a co-defendant, contrary to law [C.T. 2, 3].

The second count alleged that appellant knowingly aided and abetted the concealment and transportation of 130 pounds of marihuana, by a co-defendant, that had been smuggled into the United States from Mexico, contrary to law [C.T. 4].

The third count alleged that appellant, David Delos Dodds, Frank Anthony Rosciano, and John Doe, aka "Scotty", and divers other persons to the Grand Jury unknown, agreed, confederated, and conspired together to commit offenses against the United States, namely, knowingly and with intent to defraud the United States, to import and bring into the United States from Mexico, marihuana, without presenting said marihuana as required by United States Code, Title 19, Sections 1459, 1461, 1484, and 1485, and to conceal, and facilitate the concealment and transportation of marihuana which had been imported into

the United States contrary to law, said agreement, confederation and conspiracy being in violation of Title 21, United States Code, Section 176(a) [C.T. 4, 5].

Appellant was not named in Counts Four and Five of the indictment [C.T. 7, 8].

Appellant's case was severed and jury trial of appellant commenced on May 11, 1966, before United States District Senior Judge Roger T. Foley [C.T. 14]. Appellant was found guilty by the jury as charged in Counts One, Two, and Three on May 13, 1966 [C.T. 63]. Thereafter, on June 24, 1966, appellant was committed to the custody of the Attorney General for a period of ten years and a fine of $10,000. on each of Counts One and Two, to run concurrently as to the time to be served and not the fine, and ten years on Count Three to run concurrent with the period of imprisonment on Counts One and Two, making a total sentence of ten years and $20,000. [C.T. 64-65].

Thereafter, on July 7, 1966, appellant filed a notice notice of appeal [C.T. 66].

III

ERROR SPECIFIED

Appellant specified the following points on appeal: [A.B. 4][2]

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[2] "A.B." refers to Appellant's Brief.

1. Appellant could not be convicted of "aiding and abetting" without the conviction of those allegedly aided and abetted.
2. Appellant could not be found "guilty" of conspiracy, without a finding of "guilty" of another alleged co-conspirator.
3. The Court (a) failed to properly instruct the jury on the meaning of the terms "intent", "specific intent", "knowingly", "fraudulently", "wilfully", and others; (b) erroneously instructed the jury in its instructions Nos. 10 and 11, since the elements referred to therein did not pertain to a crime charged against appellant; and (c) failed to instruct the jury on the precise language of Title 19, Chapter 4, Sections 1459, 1461, 1484 and 1485.
4. The Court erred in giving the jury an instruction in the language of Section 176(a), Title 21, relating to the presumption of violation from possession of marihuana, unless "defendant explains his possession to the satisfaction of the jury."
5. There was no evidence of "possession" by appellant and, therefore, not sufficient evidence to convict appellant; the instructions called for a presumption based on an inference.
6. Appellant was not properly advised of his legal rights before questioning and his statements were

improperly admitted into evidence.

IV

STATEMENT OF THE FACTS

On January 7, 1965, Frank Rosciano drove a 1963 Chevrolet, bearing California license number GWL 950, into the United States from Tijuana, B.C., Mexico, containing sixty-two packages of marihuana in both door panels and under the rear seat [R.T. 52-53][3].

The 1963 Chevrolet driven by Frank Rosciano was registered to North American Leasing Company, and was rented to Al Latae. This name was an alias of appellant [R.T. 56]. The automobile was procured pursuant to an agreement that was reached at a meeting between appellant, David Dodds, who resided with appellant, and John Doe, also known as Scotty, later identified as Scott Ollendorf. The latter three were witnesses for the government. Dodds testified that the meeting was held on January 1 or January 2, 1965 [R.T. 63]. Prior to the meeting, appellant and Dodds made arrangements to obtain marihuana. Apparently, Dodds was in Minnesota at the time Ollendorf was contacted by appellant and paid $1800 for purchase and delivery of marihuana. Dodds, upon his return,

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[3] "R.T." refers to Reporter's Transcript.

requested the aforementioned meeting with Ollendorf be called to make certain the terms of the buy and delivery arrangement [R.T. 65, 66].

At this meeting, Mr. Ollendorf desired assistance in order to assure the successful fulfillment of their order. Dodds agreed to accompany Ollendorf to Mexico on January 6 in order to make the buy, and thereafter meet Rosciano on January 7, 1965, at the Capri restaurant in Tijuana. Rosciano was to be the "mule" or transporter of the marihuana, and he was to use the car furnished by appellant.

At the meeting held on January 6, 1965, to discuss the proposed trip, appellant, Dodds, Ollendorf, and Rosciano were all in attendance [R.T. 68, 69].

After Rosciano arrived in Tijuana, on the morning of January 7, 1965, he, along with Dodds and Ollendorf, drove Dodds' 1964 Cadillac to the dealer's house in the mountains in the proximity of Tijuana. After procuring the marihuana the three men drove back to the Capri restaurant to pick up the "load" car. After loading the marihuana into the 1963 Chevrolet, a final check was made for debris. Rosciano drove the car to the border where he was ultimately apprehended. Although appellant was not with the three co-defendants at the time of the purchase, or present at the border when Rosciano was found with the marihuana, he was to share equally with Dodds once the marihuana was delivered [R.T. 70-74].

The appellant was given details of the events in Tijuana and of the border incident upon Dodds' return to Los Angeles [R.T. 104, 105].

On January 28, 1965, Louis Backrach, Customs Agent, working undercover, contacted appellant. This contact was for the purpose of making a purchase of marihuana. Bachrach made the initial contact by phoning appellant from his hotel and identifying himself as Charles Farrell [R.T. 209]. Bachrach testified that at the time of the initial contact with appellant he, Bachrach, knew nothing of the present case [R.T. 216].

Appellant and Bachrach met at Bachrach's hotel and during their meeting appellant made certain statements and admissions that had reference to "a load knocked off at San Diego," and referred to a partner named "David" [R.T. 212]. Appellant also told Bachrach the size of the load seized in San Diego [R.T. 214]. These statements were allowed into evidence after the court heard arguments concerning appellant's right to the constitutional warnings before answering any questions or making any statements while in the presence of the agent [R.T. 123-143]. According to the testimony of Mr. Bachrach, these statements were in the nature of a "boast", and not in response to any questions [R.T. 222].

V

ARGUMENT

A. APPELLANT MAY BE CONVICTED OF AIDING AND ABETTING WITHOUT A CONVICTION OF THOSE WHO WERE AIDED AND ABETTED.

B. APPELLANT MAY BE CONVICTED OF CONSPIRACY WITHOUT THE CONVICTION OF AN ALLEGED CO-CONSPIRATOR.

The appellant suggests, without authority, that in order to be found guilty of aiding and abetting someone must be found guilty of the crime for which he aided and abetted. It should be noted at the outset that there is no distinction under Federal law between one who is an aider and abettor of an illegal act and the principal. 18 U.S.C., Section 2(a). All parties are chargeable as principles. Glass v. United States, 328 F.2d 754 (7th Cir. 1964).

Clearly, the crime must be shown to have been committed in order to sustain a conviction of aiding and abetting, but it is not necessary that the principal be convicted or even his identity established. Hendrix v. United States, 327 F.2d 971 (5th Cir. 1964); United States v. Provenzano, 334 F.2d 678 (3rd Cir. 1964).

Appellant further argues that only because of the improper use of the inference in Title 21, Section 176(a) of the United States Code which allows for knowledge to be

inferred from possession, was the government able to prove the element of knowledge.

Appellant cites Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962) and contends that its holding precludes the use of the inference heretofore mentioned. Hernandez says, in effect, that possession in an agent may be imputed to the principal, but not the reverse. There can be no convincing argument made for the impropriety of the inference when the facts of the case at hand are compared with the holding in Hernandez. Appellant was a principal, not an agent.

There was independent direct evidence of personal knowledge and control on the part of appellant in this case that did not exist in the Hernandez case. Before control can be established, it is not necessary to show actual or physical possession. Rodella v. United States, 286 F.2d 306, 312 (9th Cir. 1960).

Appellant's second argument, although not explicitly discussed in the argument portion of his brief, but asserted in appellant's Points on Appeal is extremely weak in that it is directly contra to a holding in this jurisdiction. This court has plainly held that a defendant may be convicted of the crime of conspiracy without the conviction of his co-conspirator.

In Ng Pui Yu v. United States, 352 F.2d 626, 633

(9th Cir. 1962), this Court held that the acquittal of all the co-conspirators does not preclude the conviction of a remaining co-conspirator and further held it is not even necessary that co-conspirators be charged.

C. THE TRIAL JUDGE DID NOT ERR IN GIVING THE INSTRUCTIONS ON THE MEANING OF "INTENT", "KNOWINGLY", "FRAUDULENTLY", AND "WILFULLY"; TRIAL JUDGE DID NOT ERR IN INSTRUCTING THE JURY AS TO THE ELEMENTS OF COUNTS ONE AND TWO OF THE INDICTMENT; TRIAL JUDGE DID NOT ERR IN FAILING TO GIVE INSTRUCTIONS ON THE LANGUAGE OF TITLE 19, CHAPTER 4, SECTIONS 1459, 1461, 1484 AND 1485.

The appellant failed to object at trial to those instructions that he now, on appeal, challenges for the first time. The appellant also failed at trial to suggest alternative instructions to those now objected to [R.T. 228]. Appellant cannot now raise objections to the instructions without any evidence of prior objections. Rule 30, Federal Rules of Criminal Procedure. Cellino v. United States, 275 F.2d 941 (9th Cir. 1960).

The instructions given were standard instructions and were proper.

Instructions 10 and 11 [C.T. 28, 29] are applicable to the offenses charged in Counts One and Two.

D. THE TRIAL COURT DID NOT ERR IN GIVING THE INSTRUCTION ON POSSESSION.

Appellant's contention is grounded on the theory that no possession existed from which to draw the inference. Appellant states the following reasons in order to establish lack of possession: (1) he exercised no control and dominion over the cargo, and (2) he was not knowledgeable of the importation and transportation until after the United States' agents had seized the cargo. For the purposes of illustrating his contention, appellant sets forth the following facts: (a) he did not participate in any packaging or border-crossing activities, (b) he was 125 miles away from the border activities, and (c) the driver of the car was not under his control since he had nothing to do with his selection [A.B. 10].

The facts stated by appellant are legally salient only in rebutting any finding of actual possession; however, in no way do these facts weaken the finding of a joint constructive possession established with the following facts: (1) appellant was Mr. Dodds' partner in the venture, (2) appellant procured the automobile for the transportation, and (3) appellant paid money to Mr. Ollendorf for the marihuana's purchase.

In Quiles v. United States, 344 F.2d 490 (9th Cir. 1965) this Court, under almost identical facts of the present

case, held that the presumption was properly used. The Court stated:

> "The testimony of Rodriquez and Cordoba that they had been sent by appellant to pick up the marihuana (which they did) from a person to whom no payment was made was required and that they were acting at his direction was evidence from which it could honestly, fairly, and conscientiously be inferred that appellant exercised dominion over and control of the marihuana sufficient to raise the statutory presumption against him. The fact appellant was not shown to have been in the actual physical presence of those in actual possession does not obviate that inference or make the instruction to the jury concerning the statutory presumption not applicable to the facts in the instant case."
> Id. at 493.

See also Rodella v. United States, supra, at 311.

In a sense, appellant argues the evidence is insufficient to show possession in appellant. The evidence is overwhelming. The trial Judge said the appeal was not

taken in good faith [C.T. 69, 75-76]. The issue of sufficiency was not preserved. Appellant made no motion for judgment of acquittal during or following the trial.

E. TRIAL JUDGE DID NOT ERR IN RULING APPELLANT'S STATEMENTS TO AN UNDERCOVER AGENT ADMISSIBLE.

The propriety of using undercover agents in ferreting out criminal activity has been sustained by the United States Supreme Court. Lewis v. United States, 385 U.S. 206, 210 (1966); Hoffa v. United States, 385 U.S. 293, 303 (1966).

Appellant argues that the ruling of the trial Judge voided the "impact and requirements enunciated in Miranda and Escobedo."

Appellant was not in custody or deprived of his freedom in any significant way while at the Beverly Hills Hotel, and there has been no showing that the statements of the appellant were in response to any questioning or interrogation. Therefore, the appellant was not entitled to any constitutional warnings.

Miranda v. Arizona, 384 U.S. 436 (1966).

VI

CONCLUSION

Appellee respectfully submits that the conviction of the appellant should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * *

GARY PETITTI, Appellant,	)	
vs.	)	No. 22345
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * *

GARY PETITTI, Appellant,	)	
vs.	)	No. 22345
UNITED STATES OF AMERICA, Appellee.	)	APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Nevada denying Appellant's motion under Title 28, United States Code, Section 2255 to vacate the judgment of commitment.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

STATEMENT OF PLEADINGS AND FACTS

The Appellant, on May 16, 1967, filed a petition to vacate sentence brought under the provisions of Title 28, United States Code, Section 2255 [TRI, 2-3][1].

---

1. TRI refers to transcript of record, Volume I.

The Appellee filed response to the petition on May 16, 1967 [TR I, 4-5]. Thereafter, on June 30, 1967, a hearing was held before the Honorable Roger D. Foley, District Judge, at which hearing the Appellant was personally present and testified [TR I, 9]. The trial court, on July 7, 1967, entered Findings of Fact and Conclusions of Law and a Judgment denying the petition [TR I, 11-20]. Notice of Appeal was filed on August 31, 1967 from the judgment of the Court. [TR I, 21].

STATEMENT OF THE CASE

The Appellant appeared before the Honorable Roger D. Foley, District Judge, on June 13, 1966 for arraignment on an Information charging him with violating Title 26, United States Code, Section 4704(a). The Appellant, at this arraignment, entered a plea of guilty to the offenses charged.

The Court, prior to accepting Appellant's plea, ascertained that the Appellant was entering the plea because he had committed the offenses and had the Appellant relate how he committed the offenses. The court, prior to accepting his plea, informed the Appellant of the penalty provision for the offenses, inquired if anyone had threatened, made promises or coerced the Appellant and that his plea was solely and voluntarily given. The Court further informed the Appel-

lant that the sentence to be imposed was entirely up to the Court [TR I, 12-15].

The Appellant appeared in Court with his counsel on July 11, 1966 for imposition of sentence, at which time the Court again informed the Appellant that the sentence to be imposed was a minimum of two years and a maximum of ten years and a fine not to exceed $20,000.00. The Court afforded Appellant's counsel and Appellant to make a statement in mitigation. Both Appellant's counsel and the Appellant expressed the desire, wish and hope to the Court that Appellant would receive medical treatment for his freely-admitted narcotic addiction. The Court sentenced the Appellant to the custody of the Attorney General for a period of ten years to become eligible for parole under Title 18, United States Code, Section 4208(2) at such time as the Board of Paroles may determine. The Court, in its commitment, recommended that the Appellant be taken to the federal institution at Lexington, Kentucky in order that his narcotic addiction may be arrested [TR I, 15-17].

The Appellant, following imposition of sentence, was initially incarcerated at Terminal Island, California and then removed to McNeil Island, Steilacoom, Washington. He He was received at Steilacoom on August 25, 1966 [TR I, 17].

The Appellant's petition to vacate the judgment of conviction was based on that he had not received medical treatment for his narcotic addiction; and, but for the fact of proffered treatment for his addiction, he would not have entered his plea to the Information as filed.

The Appellant was brought before the Honorable Roger D. Foley on June 30, 1967 to give testimony in support of his motion to vacate sentence. The Appellant testified that he had not received any treatment whatsoever for his narcotic addiction; that while incarcerated he has received vocational training in the electrical field; that at the time he entered his plea he was not aware that he would not, in fact, receive any treatment; that the sole inducing factor for his plea was the belief that he would receive treatment [TR II, 12-14][1]. It does not appear in the record that the trial court, at the time of imposition of sentence, informed the Appellant of its recommendation that he receive help for his addiction would be required to be followed or that the court's recommendation was any more than just that--a recommendation.

The trial court did inquire of Appellant's counsel what counsel had advised the Appellant. It appears from the

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1. TR II refers to the June 30, 1967 hearing

transcript that both Appellant and his family were advised that the Court had no control over the sentence, that medical treatment would have to come from the Bureau of Prisons, Washington, D.C. [TR II, 27-28]. The Court, after argument, took the petition under submission [TR II, 30].

The Court, in its formal Findings of Fact and Conclusions of Law, found that petitioner was correctly advised that the Court could not select a federal institution for his confinement but could only commit the Appellant to the custody of the Attorney General and recommend treatment; that the Appellant failed to prove by a propoundrance of evidence that his plea had been conditionally entered with the understanding that he would be committed to a United States Public Health Service Hospital [TR I, 18-19].

SPECIFICATIONS OF ERROR

The trial court erred in its finding that Appellant did not plea conditionally and with the understnnding that he would receive treatment and would be committed to a United States Public Health Service Hospital.

A R G U M E N T

When the Appellant appeared before the district court for his arraignment on June 13, 1966, prior to accepting his

plea, the Court, in compliance with Rule 11, F.R.Cr.P., made a determination that Appellant's plea was voluntary and that he understood the nature of the charge against him [TR I, 13].

The Appellant admitted selling C. D. Sherman thirty-two capsules of heroin not in the original stamped package. The Appellant was also advised by the Court that he could be subjected to a term of imprisonment of not more than two years nor more than ten years and with a possible fine of $20,000.00 and that it was within the judge's sole providence to determine what the sentence would be [TR I, 14-15]. The subject of hospitalization for the Appellant's narcotic addiction was not discussed. The trial court, at the June 30, 1967 Section 2255 hearing, commented that the subject was not touched upon [TR II, 21].

It is evident from the statement of the Appellant and the Appellant's counsel at the time of imposition of sentence that the motivating force for Appellant's plea was the belief that he would be sent to a hospital for treatment for his narcotic addiction [TR II, 15-17]. The trial court found and concluded that, after the June 30, 1967 hearing, Appellant failed to establish by a propoundrance of evidence that his plea was entered conditionally and with the understanding that he would forthwith be committed to a public

health service hospital [TR II, 19].

This Court has previously held that one's disappointment with a sentence imposed does not afford grounds for withdrawal of a plea of guilty. Pinedo v. USA, 347 F.2d 142 (9th Cir.1965), Kaldwell v. USA, 315 F.2d 667 (9th Cir. 1964). It is apparent from the record that the Appellant was disappointed with that aspect of his sentence, wherein he has failed to receive medical help for his addiction problem. Notwithstanding these decisions, it is believed that the trial court erred in refusing to grant Appellant's petition under Section 2255.

This Court, in Heiden v. USA, 353 F.2d 53 (9th Cir. 1955), entered an order of reversal when it appeared that Heiden had not intelligently entered his plea and waived his right to counsel at the time of arraignment. Any dispute as to an accused's understanding of his plea must be eliminated at the time of arraignment so that later the subjective state of the accused's mind is not an issue. Had the trial court ascertained at the time of Appellant's arraignment the condition upon which he entered his plea (belief that he would receive immediate medical treatment for his narcotic addiction), then the issues of fact that have now materialized would be non-existent and the Appellant

free from the prejudice that now exists.

C O N C L U S I O N

The trial court erred, and the Judgment, accordingly should be reversed.

Respectfully submitted

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RAYMOND E. SUTTON

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No. 22,345

IN THE

United States Court of Appeals

For the Ninth Circuit

GARY PETITTI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLEE'S ANSWERING BRIEF

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No. 22,345

IN THE

United States Court of Appeals

For the Ninth Circuit

GARY PETITTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLEE'S ANSWERING BRIEF

I. STATEMENT OF JURISDICTIONAL FACTS

This is an appeal from an order of the United States District Court for the District of Nevada denying Appellant's motion under Title 28, United States Code, Section 2255, under which section the District Court had jurisdiction.

This Court has jurisdiction of such an appeal pursuant to the provisions of Title 28, United States Code, Section 2255, Section 1291, and Section 1294.

II. STATEMENT OF THE CASE

On May 16, 1967, Appellant filed a motion to set aside sentence, pursuant to 28 USC 2255 (R. 2).[1] As

[1] "R" as used herein refers to the Record on Appeal.

is apparent from said motion, Appellant was convicted in United States District Court for the District of Nevada upon a plea of guilty to an Information charging him with a violation of Title 26, United States Code, Section 4704(a) (sale of narcotic drugs not from original stamped package). The motion further reflects, correctly, that on July 11, 1966, pursuant to the aforementioned plea, the Appellant was sentenced to the custody of the Attorney General for imprisonment for a period of ten years, subject, however, to parole eligibility under the provisions of Title 18, United States Code, Section 4208(a)(2).

At the time of sentence, the District Court recommended, as a part thereof, that Appellant be committed to a federal facility where he could receive treatment for his narcotic addiction (T. 12, L.12).[2]

On June 30, 1967, the District Court held a hearing on Appellant's motion to vacate sentence, at which it became apparent that following his sentence, Appellant was incarcerated at the Federal Correctional Institution, Terminal Island, California, and later transferred to the United States Penitentiary at McNeil Island, Steilacoom, Washington (T. 9, L. 21). Upon Appellant's incarceration at McNeil Island, he commenced a program of vocational training in the electrical field (T. 12, L. 16-25; Exhibit 1; Exhibit A). As of the date of the aforementioned hearing, Appellant had not received medical or psychiatric treatment for his addiction (T. 12, L. 15).

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[2]"T" as used herein refers to the Reporter's Transcript of Proceedings of June 30, 1967.

As apparent from the exhibits, the policy of the Bureau of Prisons is to consider treatment for addiction immediately prior to release, not upon incarceration, and the District Court specifically found that although the Appellant entered his plea of guilty to the criminal charge with the *hope* that he would immediately receive hospital treatment, the plea was nevertheless entered unconditionally, freely and voluntarily (R. 11).

The wisdom of the policy of the Bureau of Prisons is supported somewhat by the Appellant's own statement that during the past year he had had no drugs nor did he feel any need for them (T. 23, L. 9).

In prosecuting this appeal, Appellant has specified that the District Court erred in its determination that Appellant's plea to the criminal charge was not conditioned on his being immediately committed to a hospital for treatment (Opening Brief, p. 5).

III. SUMMARY OF ARGUMENT

Appellant's plea of guilty was freely, voluntarily, and unconditionally made.

IV. ARGUMENT

APPELLANT'S PLEA OF GUILTY WAS FREELY, VOLUNTARILY, AND UNCONDITIONALLY MADE.

Appellee will concede that at the time of Appellant's entering his plea, it was his hope and urgent desire that he be forthwith committed to a Government hospital facility for treatment of his narcotic addiction. Questioning of the Appellant at the hearing clearly established that no actual representation was ever made to him concerning what sentence he might receive (T. 16, L. 11-T 17, L. 19). And at the time defendant was given his opportunity to make a statement in mitigation of sentence, he stated that he would like to go to a hospital for treatment (T. 18, L. 12), thus indicating to some extent, at least, that at that point in time he had not been assured hospitalization.

As counsel for the Appellant candidly points out (Opening Brief, p. 7), this Court has held that one's disappointment with his sentence is not grounds for permitting him to withdraw his plea of guilty. *Pinedo v. United States,* 9 Cir. 1965, 347 F.2d 142, cert. den. 382 U. S. 976. As the Court indicated in *Pinedo,* a District Court's denial of a petition under 28 USC 2255 should be disturbed only when such determination is clearly established by the record to be manifestly unjust. See also *Gilmore v. People of the State of California,* 9 Cir. 1966, 364 F.2d 916.

V. CONCLUSION

Based upon the entire record herein and in view of the foregoing arguments, it is urged that the District Court's denial of Appellant's petition was not manifestly unjust and, therefore, the determination of the District Court should be affirmed.

Dated, Las Vegas, Nevada,
April 22, 1968.

Respectfully submitted,

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ROBERT S. LINNELL,
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Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY S. STONEHILL and ROBERT P. BROOKS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Central District of California.

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No. 22346

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY S. STONEHILL and ROBERT P. BROOKS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Central District of California.

APPELLANTS' OPENING BRIEF.

I.
STATEMENT OF JURISDICTION.

This is an appeal pursuant to Section 1292(b) of Title 28, U.S.C., from an interlocutory Order of the United States District Court for the Central District of California, Honorable Harry C. Westover, District Judge, denying appellants' motion to suppress evidence illegally obtained in a civil action brought by the United States of America. The complaint below was filed in January of 1965 against taxpayer appellants Harry S. Stonehill and Robert P. Brooks for the purpose of foreclosing tax liens against property owned by taxpayer appellants (and others claiming an interest in said property). The liens are based on a jeopardy assessment made by the Commissioner of Internal Revenue,

relating to taxable years 1958-1961, during which years both appellants were long-time legal residents of the Philippines. By their answer, appellants put in issue the alleged liability for taxes and a fraud penalty, underlying the assessments.

The District Court's jurisdiction rests on Sections 1340 (original jurisdiction of civil actions arising from internal revenue acts) and 1345 (original jurisdiction over actions commenced by the United States) of Title 28 of the United States Code, and on Sections 7401, 7402 (authorization to commence, and jurisdiction over civil actions under the internal revenue laws), and 7403 (actions to enforce liens) of the Internal Revenue Code of 1954.

Appellants, on March 10, 1967, moved for an order suppressing evidence illegally secured [Clerk's Transcript 2].[1] The evidence sought to be suppressed consists of in excess of thirty thousand documents, obtained by the United States as a result of raids, searches and seizures conducted on March 3, 4, and 5, 1962, against the residences and offices of appellants in Manila, Republic of the Philippines [CT 2]. These thirty thousand documents were culled by Internal Revenue agents from several truckloads of documents physically seized in over thirty different locations by over two hundred agents of the Philippine National Bureau of Investigation. These searches and seizures have been held illegal and unconstitutional by the Philippine Supreme Court and the court below (274 F. Supp. at 424) [CT 56, lines 19-22]. They were instigated, planned, directed and physically participated in by United States federal agents.

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[1]Clerk's Transcript will hereinafter be referred to as CT. Reference to Reporter's Transcript of the trial proceedings will hereinafter be made as RT.

The trial court ordered a hearing on this motion, which began on June 12, 1967, and concluded on June 23, 1967. By written Order and Opinion filed October 16, 1967, the District Court denied the motion to suppress [CT 43-57], and on October 20, 1967, granted a certificate pursuant to Title 28 USCA 1292(b) to the effect that its Order involved a controlling question of law as to which there is a substantial difference of opinion, and that an immediate appeal thereupon might materially advance the litigation [CT 58]. Petition for leave to appeal under Section 1292(b) was duly and timely filed by petitioners and granted by this Court on November 9, 1967 [CT 60].

The controlling question of law before this Court is basically whether the District Court erred in denying appellants' motion to suppress.

II.
STATEMENT OF THE CASE.

A. Statement of Facts.

Armed with forty-two search warrants subsequently found illegal by the Supreme Court of the Philippines, two hundred agents of the Philippine National Bureau of Investigation swooped down, beginning Saturday afternoon, March 3, 1962, in simultaneous raids upon thirty-two locations where appellants, both United States citizens, were believed to have financial records and documents. They seized hundreds of thousands of documents which were hauled away by the truckloads. Other items not named in the warrants, such as cash and equipment, were also seized and removed. The searches continued at some locations until three or four the following morning. The raids were marked by brandishing and pointing of firearms at employees

of appellants, prohibiting their ingress and egress from industrial and office premises, tearing out of a wall safe, the carrying away of appellant Stonehill's safe, breaking down a door, and dumping records and papers in the middle of the floor [RT 607, 636, 650, 674, 744, 748; Exs. M-Z, AA-AL].

United States Internal Revenue Agents instigated, planned, directed and physically participated in these unreasonable searches and seizures. Thereafter, these United States IRS agents culled and copied over thirty thousand documents from the hundreds of thousands of documents seized, upon which they based the jeopardy assessments which are in issue in this case.

Appellant Harry S. Stonehill, a native born American citizen and World War II G.I., was honorably discharged as a lieutenant after the war. He chose to stay in Manila, Philippine Islands, after his discharge and there met appellant Robert P. Brooks, an American citizen, born of an American father in the Philippines, who had never been in the continental United States. Brooks joined Stonehill in business shortly thereafter [CT 8].

Appellant Stonehill built a substantial number of business establishments in the Philippines, including a cigarette manufacturing company known as United States Tobacco Co. By March 3 of 1962, both Stonehill and Brooks were prominent and respected residents of Manila, active in civic, social and political affairs, after a steady rise to success during the sixteen years preceding the events of March 3, which gave rise to this litigation [CT 7, 8].

Neither Stonehill nor Brooks had been—at any time during the sixteen years preceding March 3, 1962—the subject of any investigation directed against them,

let alone of any arrest or prosecution, American or Philippine [RT 75-79].

Stonehill's superficial acquaintance with a fellow American against whom a tax investigation was pending in late 1960 caused the Internal Revenue Office of International Operations in Washington to ask Robert Chandler, the United States Internal Revenue Representative for the entire Far East (stationed in Manila), to have his staff audit Stonehill's 1958 United States tax return [RT 75-79, 81-82; Pl. Ex. 11]. IRS representative Chandler declined to undertake the investigation for lack of staff and nothing further was done [Def. Ex. A; RT 86].

In December of 1961, a disgruntled employee of U.S. Tobacco Co., Menhart Spielman, decided to be an informer against appellants. He surreptitiously conferred with a series of United States agents and officials in the Philippines, including the CIA representative, the United States Consul General, FBI agent Hawley, and finally IRS agent Chandler [RT 97-99, 107-112, 735, Ex. 11].

On the basis of Spielman's uncorroborated story and some one hundred documents which he represented to the United States officials that he had stolen from appellants' files, the United States agents determined that they might be able to work up a United States tax case against appellants, and so reported to Washington [RT 112-113, 122; Ex. 11]. For the next three weeks, FBI agent Hawley and IRS agent Chandler conducted intensive interrogations of the informer, Spielman, at Chandler's office or the informer's home [RT 112-113, 122, 126].

Apparently the unprecedented success of appellants in the Philippines had created a climate of gossip and suspicion which had permeated the United States Em-

bassy in Manila. On January 9, 1962, an extraordinary session of the top officials of the United States Embassy was held, and the highest official in residence, Minister Mein, made two policy decisions: (1) to attempt to permanently get Stonehill out of the Philippines; and (2) to attempt to develop a United States tax case against Stonehill in order to publicly improve the enforcement image of the Internal Revenue Service in the Far East [Ex. E].

On December 22, 1962, IRS agent Chandler officially requested Washington to send him a special agent and a revenue agent to work on the proposed tax investigations of the appellants [RT 129]. On January 10, 1962, Chandler repeated this request to Washington for U.S. agents to be sent to the Philippines to assist him in investigating the appellants [Ex. E].

Having no effective subpoena power in the Philippines, and having received only about a hundred papers of doubtful evidentiary value, the United States contingent in Manila could not implement the January 9, 1962, decision to get and keep Stonehill out of the Philippines and to make a widely publicized tax case against him, without using Philippine law enforcement agencies.

The U.S. agents in developing their strategy had to reconcile several factors. The agents had spent weeks interrogating the informer, from whom they extracted everything he had to offer, but they still felt that the information they had obtained from him (stolen documents) "was not very good evidence." [RT 1093]. They needed additional agents to work the case, and they needed the assistance of the Philippine government [Ex. E]. However, the informer, according to Chandler, "was afraid of his life at the time [and] he wouldn't go near a Philippine government office at

that time." [RT 141]. Finally, FBI agent Hawley and IRS agent Chandler persuaded Spielman to meet with Philippine law enforcement officials [RT 141].

On January 27, 1962, a Saturday, a three-hour secret meeting was held at the United States Embassy where FBI agent Hawley and IRS agent Chandler introduced their informer, Spielman, to Colonel Lukban, the Director of the Philippine National Bureau of Investigation (hereinafter NBI) and his assistant, Mr. Nocon [RT 139-142]. Spielman told his story, and Colonel Lukban promised that "he would inquire into it and that if Mr. Spielman's story was found to be correct, he would investigate it." [RT 143]. Obviously, prior to this secret meeting, appellants were of no official concern to the Philippine government. In fact, a new Philippine administration had been inaugurated in January of 1962. The new Secretary of Justice, Jose Diokno, had just taken office [RT 151].

On February 1, 1962, another secret meeting was held in a private club in order to induce the new Secretary, Diokno, to go along with the U.S. Agents. Besides Diokno, FBI agent Hawley and IRS agent Chandler attended [RT 153]. Chandler advised the group that he thought he could make a substantial U.S. tax case against appellants but that he did not have enough evidence to proceed [RT 158-159]. Secretary Diokno expressed interest and asked that arrangements be made for him to personally discuss the matter with U.S. Attorney General Kennedy who was then traveling in the Far East [RT 161-162]. Diokno felt "that if he was going to stick his neck out . . . and go into this, he thought probably the United States should also go aggressively into it and he evidently would have more confidence if the U.S. was working on it from whatever U.S. violations there might be . . ." [RT 161].

On February 4, 1962, Secretary Diokno met Spielman, the informer, and heard his story. On February 5, 1962, Diokno discussed the matter with the then President Macapagal of the Philippines [RT 838; Ex. 12, pp. 15-16].

IRS agent Chandler met twice with Secretary Diokno and telephoned Hong Kong in an effort to arrange a meeting with Kennedy [RT 205, 984]. Prior to his trip to Hong Kong, which was from February 10, 1962, to February 13, 1962, Secretary Diokno left instructions that no action should be taken until his return from Hong Kong [RT 164]. His personal aide, Del Rosario, testified: "Well, it took time before the Secretary of Justice decided to enter this." [RT 835]. "Well, he [Dikono] told me in the beginning, after I was briefed in this case, he could not decide whether he was going to get into this case all the way or not." [RT 836]. "He was planning to go to Hong Kong, and we were not to take any action until he returned from Hong Kong." [RT 840]. "Well, before this trip we were not supposed to take any action on the Stonehill case until after he returned, because whatever action was dependent on the outcome of his trip to Hong Kong." [RT 841]. The Diokno aide further testified that when Diokno returned from Hong Kong, he was instructed to proceed with the Stonehill and Brooks matter [RT 842]. IRS agent Chandler testified that he received word that the "raids had been discussed in Hong Kong by Diokno with a member of Kennedy's staff." [RT 167]. Diokno agreed to proceed with the raids albeit not "through ordinary Philippine government channels." [Ex. AZ]. Diokno's aide testified that: "Well, we had some sort of an agreement that we were going to get a backing from the United States in the event that something like this would happen." [RT 880].

Between February 1, 1962, and February 12, 1962, while Diokno was trying to work out his agreement with the United States, there were daily meetings at the home of IRS agent Chandler between the U.S. agents and the Philippine agents. These meetings were held for the sole purpose of planning and preparing for the upcoming three days of searches and seizures [RT 149, 278-280].

Once Diokno met the United States Attorney General's Executive Assistant in Hong Kong and had reached an agreement with the United States relative to their support and participation, the United States Consul General in Hong Kong on February 12, 1962, sent a cable to the United States Department of State with copies to Department of Justice and to the IRS outlining the agreement and that Diokno would conduct raids in the end of February of 1962 [Ex. AZ].

Now the preparations and planning for the raids continued with Diokno's concurrence. Numerous meetings were held in Chandler's home with the Director of NBI and his agents [RT 273]. At these meetings IRS agent Chandler advised the NBI personnel of the various types of financial records and documents which the United States Internal Revenue Service would be interested in securing. The informer attended some of these meetings and advised the agents about locations to search and what might be found at the various locations [RT 316, 991]. Chandler testified that: "We emphasized that our emphasis was in financial matters and records." [RT 316].

Throughout the preparations for the raids, Chandler stressed to the Philippine officials that he needed vouchers, accounting sheets and books of account to make an American "net worth" tax case against Stone-

hill and Brooks [RT 847, 848]. Major Del Rosario, the "right arm" of the Philippine Secretary of Justice, testified that the Philippine Department of Justice entered the case solely for the purpose of "helping the U.S. agents in developing their tax case" [RT 836], and that the Philippine Government was not interested in making any tax case at all [RT 848].

U.S. agents were dispatched to Manila from Washington immediately after receipt of the cable reporting the United States-Diokno agreements of February 12, 1962. The raids were originally scheduled for February 24, 1962, but they were postponed until March 3, 1962, for the sole reason that the agents who were coming from the United States to help agent Chandler had not arrived [RT 843, 844].

During the preparations for the raids, Secretary Diokno personally came to Chandler's home to discuss the seizure of appellants' records [RT 197-199]; and Chandler's home became the headquarters for the entire raid planning, as the NBI, which was wire-tapping appellants' telephones, brought current recordings of wire-tapped conversations to Chandler's home, where they were played and listened to by Chandler and the NBI agents [RT 149-150].

Prior to the raids, Chandler gave NBI agents detailed written instructions as to what to do and what to seize [Exs. I, J]. Chandler admitted in his testimony that all of Exhibit I was in his handwriting, and that most of Exhibit J was in his handwriting [RT 341, 862, 866-867]. Exhibit I, in part, directs the NBI agents with reference to certain locations to "Confiscate records in separate small adjoining buildings—this is building from which John Brooks carried stamps at night;" and "To be taken apart in detail—possible

stamp hideout." Exhibit J is a sketch of floorplans of two of the buildings to be searched with specific locations identified as possible sources of documents.

On February 26, 1962, IRS Revenue Agent William Ragland arrived in Manila to assist Chandler in the investigations of appellants [RT 990]. Chandler instructed Ragland to familiarize himself with the case and to obtain photographic equipment to be used to copy documents seized in the raids [RT 271-272]. By this time, Chandler had already worked out an agreement with Colonel Lukban whereby all of the documents seized in the raids would be made available to the U.S. IRS agents for inspection and copying [RT 271, 923].

On March 2, 1962, the night before the raids, there was a briefing session for the NBI team leaders who would lead the two hundred NBI agents on the raids. The session was held in Colonel Lukban's home. Agent Chandler was invited and attended this final briefing session [RT 300-304]. Chandler made two vital contributions at this meeting: he reviewed and approved the contents of the search warrants which were being typed then and there; and he selected the room at the Army-Navy Club as an additional location to be searched. This room at the Army-Navy Club was not even in either of appellants' name, and was not on the list of locations that were to be searched. Thus, but for Chandler's direction this location would never have been searched [RT 305, 306, 308, 311-316, 346, 1008-1011]. Even the trial court, when it was apprised of this evidence, stated on the record that this selection of the room in the Army-Navy Club by IRS agent Chandler is "at least one example of a participation" [RT 1196].

On Saturday morning, March 3, 1962, with elaborate secrecy, the NBI was able to get forty-two search

warrants signed by local judges and the two hundred NBI agents were ready to commence their raids [Ex. 12, pp. 144-145; Exs. M-Z, AA-AL]. However, prior to commencing the raids, it was the strategy to place both appellants under arrest and hold them without bail. In order to accomplish this, Secretary Diokno, on the day of the raids, arranged to have appellants arrested on non-bailable deportation charges [RT 197-199]. Chandler was aware of this stratagem before the raids [RT 199]. The arrests of appellants on these charges was the first official act of deportation by the Philippine government. Major Del Rosario, Diokno's right arm, testified that the Under Secretary of Justice was the Chairman of the Deportation Board and had been alerted on March 2, 1962, to meet Diokno and Del Rosario at 8:00 A.M. on March 3, 1962. The meeting took place, and for the first time deportation charges were signed by Diokno's Under Secretary [RT 852-853]. None of the forty-two search warrants in any manner deal with deportation charges [Exs. M-Z, AA-AL].

At approximately 1:00 P.M. on March 3, 1962, the appellants were arrested and the raids commenced [RT 397-399]. The IRS agents, Chandler and Ragland, plus IRS agent Reynolds, who was stationed in Manila, were also working that Saturday. Armed with pencils, paper and copying equipment, the U.S. IRS agents stationed themselves at the Arson Squad Building of the NBI in accordance with prior arrangements with Director Lukban [RT 280-282, 387].

The U.S. IRS agents did not remain at their station. On more than one occasion while the raids were in progress, they left and personally participated in the searches and assisted in the selection of documents to be seized. Agent Chandler went to the apartment of the

United States Colonel in charge of OSI from where he was able to observe the progress of the search at one of the selected locations [RT 393-394].

While the searches and seizures were still in progress, agent Chandler telephoned Colonel Lukban several times, and at about 10:00 P.M., in response to Colonel Lukban's telephone call, the IRS agents went to the Colonel's office. At this time, some seized items were shown to the IRS agents, and they requested permission to start photocopying but were told to wait until the documents were logged [RT 1017-1019]. An NBI agent came into the office, spoke to Colonel Lukban, who in turn told Chandler and the two IRS agents that the NBI agent "had run into a big area of records and he didn't know what—he was not qualified to determine what he should take and what he shouldn't take." [RT 1019-1020]. According to Chandler's testimony, Colonel Lukban asked Chandler and the two agents "if myself and the men would go down there and look at the records and see what should be taken and what should be left behind." [RT 1020]. The U.S. agents then went to a warehouse of the U.S. Tobacco Co., which was still being searched by the NBI agents, and according to Chandler's testimony, he and the two agents: "went through the records and segregated what we thought might be important, and left them I think in the box there, put them in a box." [RT 1020]. Chandler continued: "We looked for general ledgers, the important records books" [RT 121]; and they selected what they thought were significant from an accounting point of view [RT 1022].

Chandler's testimony about his participation in the search was corroborated by Miss Zubiri, an employee of the telephone company in Los Angeles at the time of the hearing who in 1962 was an employee of

U.S. Tobacco Co. She testified that she was at work on Saturday, March 3, 1962, in the warehouse when, at about 3:00 P.M., numerous NBI agents swarmed in with drawn guns and started to search the premises [RT 636-637]. She was kept in the warehouse until 3:00 A.M. the next morning while the search was on [RT 643]. At around 10:30 P.M. she saw agent Chandler enter the premises and she asked him if he was an FBI man. She said he responded: "Don't say that, little girl, don't say that word, little girl." [RT 646]. She also saw IRS agent Ragland in the premises while the search was in progress [RT 648]. She saw the U.S. agents go through the warehouse looking at things while the NBI agents "kept on searching the place." [RT 650].

The U.S. agents then left the warehouse and went to the main office of the U.S. Tobacco Co. where the NBI agents were still searching [RT 413, 414, 1024, 1025]. Agent Chandler testified that he entered the building and asked the NBI agent in charge if he had found certain records stored behind the main office; and when the NBI agent seemed unfamiliar with the location, Chandler went up into the building and physically pointed out the area to be searched [RT 415, 1025].

Chandler's testimony about his activities at the main office were also corroborated by the testimony of Mr. Geronimo Taal, the paymaster of U.S. Tobacco Co. [RT. 596]. Mr. Taal testified that he was present on March 3, 1962, when the NBI agents arrived at about 3:00 P.M. and commenced their search [RT 598] which lasted until 4:00 A.M. [RT 608]. Between 8:00 P.M. and midnight, Mr. Taal saw agent Chandler on the premises while the raid was in progress and in the company of NBI agents [RT 600-605]. He testified

that he saw the NBI agents smash open a door, and the U.S. agent enter the record room with the NBI agents [RT 605].

On Sunday night, March 4, 1962, an apparent victory party was held at the home of FBI agent Hawley. Among those present were: Colonel Lukban, Secretary Diokno, Danny Nocon, Major Del Rosario and IRS agent Chandler. During the festivities, agent Chandler remarked that he was right in telling them to raid the Army-Navy Club [RT 426-427].

At 8:30 A.M. on Monday, March 5, 1962, U.S. IRS agents Ragland and Reynolds established themselves at NBI headquarters and began the monumental task of inspecting hundreds of thousands of seized documents from which they culled some thirty thousand documents, which provide the sole basis for the institution of this case [RT 1037, 1153].

Nearly three years after these raids, in January of 1965, jeopardy assessments were served upon appellants, and soon thereafter this case was instituted.

On June 19, 1967, the Supreme Court of the Philippines, in a unanimous opinion, held that the searches and seizures of March 3, 1962, were illegal and violated the Philippine constitutional guarantee against unreasonable search and seizure (which is identical to the Fourth Amendment to the United States Constitution [Ex. AW, 20 Phil. Sup. Ct. Rpts. Ann. 383 (1967)].

In view of this decision by the Philippine Supreme Court and Judge Westover's Memorandum Opinion below, in which he holds that the searches and seizures of March 3, 1962, were illegal under United States Constitutional standards (274 F. Supp. 420, 424), the above statement of facts has not stressed the facts of illegality of the searches and seizures but rather the facts relating to the United States involvement in the searches and seizures.

B. Statement of Legal Issues.

1. Does the Fourth Amendment to the United States Constitution exclude from use in federal courts evidence against United States citizens that was obtained in a foreign country by a series of searches and seizures that violated the constitutional guarantees of the foreign country and would have violated the constitutional guarantees of the United States had they been conducted in the United States?

2. Were the illegal searches and seizures in this case in substance illegal searches and seizures by the United States government because of the involvment of the United States agents?

III.
SPECIFICATION OF ERRORS.

A. The trial court erred in denying appellanats' motion to suppress evidence as illegally seized.

B. The trial court erred in its finding of ultimate fact and conclusion of law that the U.S. federal agents "did not participate in, were not present at, or a party to the raid conducted by the Philippine National Bureau of Investigation."

1. The trial court erred in concluding that the intermediate facts it did find did not constitute federal "participation" in the illegal searches and seizures.

2. The trial court erred in not finding on the evidence adduced that the U.S. federal agents: instigated, engineered, directed and planned the illegal searches and seizures; and that the U.S. federal agents were present at and during the illegal searches and seizures; and the U.S. federal agents assisted in selecting and securing evidence that was seized during the illegal searches.

IV.
SUMMARY OF ARGUMENT.

A. (1) The motion to suppress should have been granted by the District Court. The searches and seizures producing the evidence sought to be suppressed were held by the Supreme Court of the Philippines to have been illegal and unconstitutional under Article III (Sec. 1, par. 3) of the Philippine Constitution (identical to the Fourth Amendment of the U.S. Constitution) and the Philippine Rules of Court (equivalent to the U.S. Federal Rules of Civil and Criminal Procedure). (2) The searches and seizures were illegal by U.S. Constitutional standards. The court below so held. Evidence obtained through the illegal searches and seizures of March 3, 1962 cannot be used in any proceedings in a U.S. Federal Court, including the instant tax and penalty enforcement proceedings.

B. The historic development of the Fourth Amendment to the U.S. Constitution has been an evolutionary process so that today it contains not only a declaration of a right but an implicit remedy for a violation of the right. It must be read as guaranteeing the people to be secure from unreasonable searches and seizures and excluding from evidence any material obtained as a result of an unreasonable search and seizure, regardless of who did the searching and seizing.

C. United States agents obtained evidence in the Philippines through illegal searches for the purpose of enforcing the Federal tax liability of appellants, who are American citizens and were legal residents of the Philippines. American citizens who—while residing

abroad—are liable for the payment of Federal taxes under the Sixteenth Amendment of the United States Constitution. Also, they enjoy—while residing abroad —the protection of the Fourth and Fifth Amendments to the Constitution when the American Government exercises jurisdiction over them. The Constitution follows the Flag.

D. (1) The intermediate findings of fact set out in the opinion of the District Court constitute sufficient Federal involvement to make the illegal searches in substance searches by Federal agents. (2) *Brulay v. U.S.*, 383 F. 2d 345 (CA 9, 1967) is clearly distinguishable on the facts from those found by the District Court in *U.S. v. Stonehill.* The only claim to U.S. involvement in *Brulay* rests on a telephone call by a U.S. narcotics agent to Mexican *federal* police prior to the arrest and seizures, which seizures were conducted by Tijuana *municipal* police. No causal connection between the U.S. "alert" of the Mexican federal agents and the arrest and seizures by the Mexican municipal police was shown. There is no intimation that the *Brulay* arrest was unlawful under Mexican constitutional standards.

E. There was uncontradicted evidence before the District Court, disregarded or misinterpreted in the trial court's opinion, which requires a finding of ultimate fact and a conclusion of law that there was U.S. instigation and participation and that the illegal searches of March 3, 1962, were in substance searches by federal agents. The evidence shows:

> (a) There was no pending Philippine investigation (or interest in any investigation) of the appellants prior to February or March of 1962.

(b) U.S. officials induced Philippine officials beginning on January 27, to begin an investigation.

(c) The Philippine Secretary of Justice insisted on, and obtained, a special meeting with a top U.S. Department of Justice official in Hong Kong before assisting the U.S. by authorizing the raids "outside of ordinary Philippine government channels."

(d) U.S. and Philippine officials together, in the private home of the chief U.S. tax enforcement agent, planned and prepared for the illegal seizures.

(e) U.S. officials actively assisted in the preparation for the raids by written instructions for searches and seizures and selection of a key location. They were physically present in at least two locations and physically selected accounting records important to their tax case and directed that the same be seized. These and other actions by the U.S. Revenue and FBI agents, as detailed in the argument, *infra,* clearly constitute "instigation" of the illegal searches which on the facts makes this Court's decision in *Brulay* inapplicable. They constitute "participation" within the purview of *Byars v. U.S.,* 273 U.S. 28, 47 S.Ct. 248; *Lustig v. U.S.,* 338 U.S. 74, 69 S.Ct. 1372, and this Court's *en banc* decision in *Corngold v. U.S.,* 367 F. 2d 1 (1966). To hold otherwise would be equivalent to acquitting a criminal of complicity who hires a gunman and works out detailed plans for a murder because he did not personally pull the trigger. The evidence in this case shocks the conscience and non-suppression would be an invitation to Federal offcers to violate the constitutional rights of American citizens by subterfuge.

V.
ARGUMENT.

A. THE DISTRICT COURT ERRED IN DENYING THE MOTION TO SUPPRESS.

(1) The Searches and Seizures Were Illegal Under Philippine and U.S. Constitutional Standards.

This case was brought by the United States to foreclose liens and to reduce assessments of tax deficiencies and fraud penalties to judgment. Both the deficiencies and the penalties are substantial and in issue.

When the District Court was apprised of the fact that the evidence underlying the assessments was obtained through illegal searches and seizures (claimed by appellants to have been instigated and participated in by United States agents) the Court severed the issue of suppression or inadmissibility of such evidence and set it down for trial in advance of the trial on the merits [CT 2].

While the issue of suppression was being tried, the Supreme Court of the Philippines, in *Stonehill, et al. v. Diokno, et al,* 20 Phil. Sup. Ct. Rptrs. Ann. 383 (1967) [Ex. AW], unanimously held that the very searches and seizures involved here were, indeed, illegal and in violation of Section 1, Paragraph 3 of Article III of the Philippine Constitution. This Section reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

The Philippine Supreme Court based its holding on the illegality of the search warrants, with regard to which it said:

> "Two points must be stressed in connection with this constitutional mandate, namely: (1) that no warrant shall issue but upon *probable cause,* to be determined by the judge in the manner set forth in said provision; and (2) that the warrant shall *particularly* describe the things to be seized.
>
> "None of these requirements has been complied with in the contested warrants. Indeed, the same were issued upon applications stating that the natural and juridical persons therein named had committed a 'violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code.' In other words, no *specific* offense had been alleged in said applications. The averments thereof with respect to the offense committed were *abstract.* As a consequence, it was *impossible* for the judges who issued the warrants to have found the existence of probable cause, for the same presupposes the introduction of competent proof that the party against whom it is sought has performed *particular* acts, or committed *specific* omissions, violating a given provision of our criminal laws. As a matter of fact, the applications involved in this case do not allege any specific acts performed by herein petitioners. It would be a legal heresy, of the highest order, to convict anybody of a 'violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code,'—as alleged in the aforementioned applications—without reference to any determinate provision of said laws or codes." (pp. 6, 7 of Opinion [Ex. AW], quoted in the District Court's Opinion, 274 F. Supp. at p. 424).

The Philippine constitutional provision—held violated by the Philippine Supreme Court—is almost identical in language with the Fourth Amendment to the United States Constitution. It was adopted by the Philippines in conscious duplication of the Fourth Amendment [Ex. AT] (*Cf.* Testimony of Dean Jose Aruego, delegate to the Philippine Constitutional Convention, a graduate of the University of Manila, and holding the degree of Doctor of Jurisdictional Science from George Washington University of Washington, D.C. [RT 762]).

The Supreme Court of the Philippines is the highest court of that country [RT 761] and procedure in the Philippines is governed by Rules of Court promulgated by the Supreme Court which are substantially equivalent to the Rules of Federal Civil and Criminal Procedures of the United States [RT 762].

In holding the searches illegal under the Philippine Constitution and Rules of Court, the Philippine Supreme Court relied to a great extent on American precedent and U.S. Supreme Court cases interpreting the Fourth Amendment [RT 783-784]. It cited *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359 (1949); *Elkins v. U.S.,* 364 U.S. 206, 80 S. Ct. 1437 (1960); and *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684 (1961) [Ex. AW, p. 10, ftn. 20].

In view of (1) the identity in language of Section 1, paragraph 3 of Article III of the Philippine Constitution with the Fourth Amendment to the United States Constitution; (2) the substantial identity of Philippine procedural rules with U.S. Federal procedural rules, and (3) the reliance by the Philippine Supreme Court on U.S. Supreme Court decisions on the Fourth Amendment, illegality of the searches under U.S. constitutional standards appears self-evident.

In addition, the District Court independently came to the conclusion that the records and documents which

were the subject of the motion to suppress, were obtained through searches and seizures that would be illegal had they been conducted in the United States (274 F. Supp. 426).

In a criminal action involving the same documents, *United States v. Stonehill, et al.,* 254 F. Supp. 1003 (1966)[2] the United States District Court for the Southern District of New York found that "the Government appears to concede that if its representatives significantly participated in and contributed to the illegal searches in the Philippines . . . the material may be suppressed." (254 F. Supp. at p. 1004).

(2) The Exclusionary Rule Regarding Evidence Illegally Procured Applies to This Action.

The exclusionary rule with regard to evidence illegally obtained must apply to the instant case, despite the fact that it is labelled a "civil action." The Court below so found (274 F. Supp. at p. 425 [CT 55, 56]), citing Mr. Justice Brennan's opinion in *Wong Sun v. U.S.,* 371 U.S. 471 at 486, to the effect that the doors of the Federal courts must be closed "to *any* use of evidence unconstitutionally obtained." Appellee did not seriously contest below, and by consenting to the petition for permission to file this appeal, appears to concede in this Court, the applicability of suppression to the case at bar. The concession is consistent with the Government's failure to perfect an appeal in *United States v. Joseph A. Chase* (US DC DC), unreported, C.A. #2589-63 (1966), where the District Court suppressed illegally obtained evidence in a similar action under Sec. 7403 of Title 26, to reduce to judgment a tax liability based on a jeopardy assessment.

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[2]Later voluntarily dismissed by the Government against Defendant Stonehill and resulting in an acquittal after trial on the merits of the other defendants.

There is other precedent for suppression in civil cases to which the Government is a party. Evidence obtained by the Government in violation of the Fourth Amendment cannot be used by it "at all." *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385, 40 S. Ct. 182 (1920); *Rogers v. U.S.,* 97 F. 2d 691 (CA 1, 1938); *Berkowitz v. U.S.,* 340 F. 2d 168 (CA 1, 1965); *Powell v. Zuckert,* 366 F. 2d 634 (CA DC 1966); *Saylor v. United States,* 374 F. 2d 894 (Ct. of Cls. 1967); 8 *Wigmore on Evidence,* 1964 Supp., p. 10. Suppression of evidence can be sought in a civil suit, regardless of whether there is a criminal proceeding pending or not. *Goodman v. U.S.,* 369 F. 2d 166 (CA 9, 1966).

The case below involves a fifty per cent penalty and cases involving forfeitures and penalties are quasi-criminal in nature and subject to the exclusionary rule. *Boyd v. U.S.,* 166 U.S. 616, 6 S. Ct. 524 (1886); *Helvering v. Mitchell,* 303 U.S. 391, 58 S. Ct. 630 (1938); *Tovar v. Jarecki,* 173 F. 2d 449 (CA 7, 1949); *Lassoff v. Gray,* 207 F. Supp. 843 (US DC WD Ky., 1962).

In 1965, the U.S. Supreme Court held in *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 85 S. Ct. 1246, that the exclusionary rule of *Weeks v. U.S.* and *Mapp v. Ohio* applied to forfeiture proceedings.

The Internal Revenue Service, through its Associate Chief Counsel, publicly conceded that "[it] would be inadvisable to rely upon . . . evidence . . . illegally obtained by the Federal Government, especially by the Internal Revenue Service, particularly in cases where the 50% fraud penalty is involved, because of the *Plymouth Sedan* case." (Vol. 20, #1, Bulletin of the Section of Taxation, American Bar Ass'n., p. 51).

Thus, the court below erred in denying appellants' motion to suppress the evidence obtained in searches and seizures which are illegal under both U.S. and Philippine standards, and must be reversed on one or more of the grounds hereafter urged.

B. THE U.S. CONSTITUTION PROHIBITS THE USE IN A FEDERAL COURT OF EVIDENCE OBTAINED IN AN UNREASONABLE SEARCH AND SEIZURE.

(1) Synopsis of Appellants' Position.

Appellants' position is based on the Fourth Amendment to the United States Constitution as it has evolved to 1968. When the history of the Fourth Amendment is carefully examined, appellants' conclusion is irrefutable.

(2) The Fourth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

(3) The Historical Development of the Fourth Amendment and the Evolution of the Exclusionary Rule in the Decisions of the United States Supreme Court.

The very words of the Fourth Amendment that people's rights "shall not be violated," posits a right that

is clear, direct and unequivocal, but there is no hint in the constitutional language of a remedy if this right is violated. Because the first ten amendments to the Constitution have been held to be limitations on the federal government only, the Fourth Amendment was interpreted as saying that the people's right "to be secure . . . against unreasonable searches and seizures, shall not be violated" by the federal government. So we must first trace the development of the meaning of the Fourth Amendment by examining the cases that dealt with the people's remedies if the federal government violated the people's right to be secure against unreasonable searches and seizures.

The beginning point appears to be *Boyd v. U.S.*, 116 U.S. 616, 6 S. Ct. 526 (1886), wherein the Court held that the federal law which authorized the compulsory production of a claimant's documents in court in a forfeiture proceeding was unconstitutional and void under the Fourth and Fifth Amendments.

In *Weeks v. U.S.*, 232 U.S. 383, 34 S. Ct. 341 (1914), the Supreme Court held that the Fourth Amendment "is not directed to individual misconduct of such officials" as the police acting independent of federal authority and the evidence obtained by the police was not a problem under the Fourth Amendment; but the evidence obtained by the United States Marshal should have been suppressed because it was taken "in direct violation of the Constitutional rights of the defendant."

In *Gouled v. U.S.*, 255 U.S. 298, 41 S. Ct. 261 (1921), Justice Clark held for the Court: "[T]he secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only, by a representative of any branch

or subdivision of the government of the United States, is a violation of the Fourth Amendment." In reaching this conclusion, Justice Clarke commented as follows on the importance to political liberty and welfare of our country of the due observance of the rights guaranteed under the Constitution by the Fourth and Fifth Amendments:

> "The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." (p. 263).

In *Byars v. U.S.*, 273 U.S. 28, 47 S. Ct. 248 (1927), the Court held that a federal agent's participation in a State-administered illegal search and seizure pursuant to a warrant makes the search a federal search and the materials therein seized are not admissible in a federal court. The Court said:

> "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when

> the federal government itself, through its agents acting as such, participates in the wrongful search and seizure. To hold the contrary would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official action." (p. 250).

In *Gambino v. U.S.,* 275 U.S. 310, 48 S. Ct. 137 (1927), Justice Brandeis, writing for the Court, held that evidence obtained by state troopers without any federal direction, presence or participation was nonetheless "obtained by invasion of . . . constitutional rights" and excludable as evidence because the state troopers were acting to enforce federal laws.

Thus, it is clear that by 1927, any search that violated the requirements of the Fourth Amendment rendered any evidence produced inadmissible in the federal courts if the federal government was the searcher, a participant, or the authority for the search.

On June 27, 1949, the United States Supreme Court decided two significant cases: *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359; and *Lustig v. U.S.,* 338 U.S. 74; 69 S. Ct. 1372.

In *Wolf v. Colorado,* Justice Frankfurter, writing for a divided court, held that evidence obtained under circumstances which would have rendered it inadmissible in a federal prosecution because it violated the Fourth Amendment was not thereby inadmissible in State Court prosecutions. However, Justice Frankfurter made clear that the due process clause of the Fourteenth Amendment did provide a right to be secure in one's privacy against arbitrary intrusion by the police; however, the enforcement of that right did not include the exclusion from evidence of materials so obtained from State Courts.

Justice Rutledge dissented on the basis that the Fourteenth Amendment included the Fourth Amendment, and that evidence obtained in violation of the Fourth Amendment was excludable, as a matter of constitutional law, both in the Federal and State courts. He said:

> "As Congress and this Court are, in my judgment, powerless to permit the admission in federal courts of evidence seized in defiance of the Fourth Amendment, so I think state legislators and judges —if subject to the Amendment, as I believe them to be—may not lend their offices to the admission in state courts of exidence thus seized. Compliance with the Bill of Rights betokens more than lip service." (p. 1368). Justice Douglas also dissented. He said:
>
> "I agree with Mr. Justice MURPHY that the evidence obtained in violation of it (Fourth Amendment) must be excluded in state prosecutions as well as in federal prosecutions, since in absence of that rule of evidence the Amendment would have no effective sanction." (p. 1372).

In *Lustig v. U.S., supra,* the issue was the admissibility in a federal prosecution of evidence obtained by city police through an unreasonable search and seizure. No federal agent requested the search nor was the search undertaken by local police to aid the enforcement of federal law, but a federal agent did assist in selecting some of the evidence to be seized. The Court held that evidence so obtained was not admissible in a federal prosecution because of the federal participation.

> "The crux of that doctrine is that a search is a search by a federal official if he had a hand in

> it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." (p. 1374).

Justice Murphy wrote a concurring opinion in which he said:

> "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us." (p. 1375).

From these two landmark decisions in 1949, several conclusions can be drawn relative to the Fourth Amendment.

1. Part of the Court held that it not only guarantees a right of the people but it also contains an implicit remedy, namely, that evidence obtained by an unreasonable search and seizure was not admissible in any court no matter what officials participated in the search.

2. The majority of the Court held that evidence obtained by an unreasonable search and seizure was not admissible in a federal court if federal officials or federal law were involved in the search.

3. The majority of the Court held that evidence obtained by an unreasonable search and seizure by State officers violated the Fourth Amendment but such evidence was still not excluded from State courts.

It appears clear that the Court was changing its views relative to the Fourth Amendment so that this Amendment was being construed to contain not only a declaration of a right but also an implicit remedy which all courts must invoke whenever that right was violated.

But evidence obtained by an unreasonable search and seizure committed exclusively by State officials and without any knowledge or participation by federal officials and without any reliance on federal law was still admissible in federal court. This was the "silver platter doctrine."

In 1960, the Court abolished the "silver platter doctrine." In *Elkins v. U.S.*, 364 U.S. 206, 80 S. Ct. 1437, State officers made an unlawful search and seizure and the State court so held, but the same evidence was turned over to federal officials on a "silver platter" and admitted into evidence in federal court. This court affirmed the conviction (266 F. 2d 588). Justice Stewart delivered the opinion of the United States Supreme Court reversing the conviction and abolishing the silver platter doctrine. He wrote:

> "For these reasons we hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial. In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." (p. 1447).

Four justices dissented and Justice Frankfurter wrote a dissenting opinion in which Justices Clark, Harlan, and Whittaker joined. He said:

> "The Court asserts that there is no longer any logic in restricting the application of the Weeks exclusionary rule to the fruits of federal seizures, for Wolf recognizes that state seizures may also encroach on interests protected by the Federal Constitution. The rule which the Court announces on the basis of this analysis is that there is to be excluded from federal prosecutions all evidence seized by state officers 'during a search which, if conducted by federal officers would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment.' As the Court's rule only purports to exclude evidence seized by state officers in violation of the Constitution, it is plain that the Court assumes for the purposes of these cases that, as a consequence of Wolf, precisely the same rules are applicable in determining whether the conduct of state officials violates the Constitution as are applicable in determining whether the conduct of federal officials does so, and precisely the same exclusionary remedy is deemed appropriate for one behavior as for the other.
>
> "In this use of Wolf the Court disregards not only what precisely was said there, namely, that only what was characterized as the 'core of the Fourth Amendment,' not the Amendment itself, is enforceable against the States, but also the fact that what was said in Wolf was said with reference to the Due Process Clause of the Fourteenth Amendment, and not with reference to the specific guarantees of the Fourth Amendment. The scope and effect of these two constitutional provisions cannot be equated, as the Court would have it." (pp. 1455, 1456).

The *Elkins* decision then, as the dissent pointed out, added one more dimension to the evolving meaning of the Fourth Amendment. At least as far as federal courts were concerned, it did not matter who made the illegal search and seizure—that the emphasis was now gone; the critical factor was that the Fourth Amendment itself prohibited the admission into evidence of anything obtained by an unreasonable search and seizure *no matter who did the searching and seizing.* This was a fundamental departure from the earlier interpretation of the Constitutional right and a vital step in the evolution of the Fourth Amendment. The Fourth Amendment itself provides a remedy in the act of declaring the right. Under the *Elkins* gloss the Fourth Amendment now means that the people are secure from unreasonable searches and seizures, and in federal courts any evidence so obtained is excluded no matter who obtained it.

There is one further step we must take in this evolutionary process.

One year after *Elkins,* the Court decided *Mapp v. Ohio,* 267 U.S. 644, 81 S. Ct. 1684 (1961). Mr. Justice Clark, writing for the Court, reviewed the Court's holdings in *Boyd, Weeks, Byars, Wolf, Elkins,* and others and then held:

> "Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence ob-

tained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (p. 1691).

* * *

"Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy —be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." (p. 1962).

* * *

"Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense." (p. 1693).

* * *

"Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." (p. 1694).

Mr. Justice Black wrote a concurring opinion, in which he said:

> "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since Wolf, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." (p. 1695).

Mr. Justice Douglas also wrote a concurring opinion. Mr. Justice Harlan wrote a dissenting opinion in which Justices Frankfurter and Whittaker joined in full and Mr. Justice Stewart Joined in part. He said:

> "Essential to the majority's argument against Wolf is the proposition that the rule of *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 632, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the 'supervisory power' of this Court over the federal judicial system, but from Constitutional requirements. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts." (p. 1704).

Thus, we have traced the evolution of the Fourth Amendment over many years until today it clearly contains not merely a declaration of a right but also a remedy for the violation of that right: evidentiary exclusion. It is no longer a question of who searched, but rather whether there was an unreasonable search and seizure. Evidence thus obtained is not admissible in a federal court on Constitutional grounds.

C. THE UNITED STATES CONSTITUTION PROTECTS UNITED STATES CITIZENS RESIDING ABROAD.

In grounding its denial of the motion to suppress on *Brulay v. U.S.*, 383 F. 2d 345 (CA 9 1967), the District Court overlooked differences of fact and applicable law between the *Brulay* case and the instant case.

Most of the factual distinctions will be argued *infra* except the one factual distinction on which a most important legal distinction between *Brulay* and the case at bar is based: In *Brulay,* the defendant did not reside abroad nor was there any U.S. exercise of jurisdiction over him while he was abroad. In *Stonehill,* the appellants were legal residents of Manila, and the United States, through its Internal Revenue representative for the Far East, was acting in Manila to enforce the liability for U.S. Federal income taxes of two American citizens. It had stationed in Manila a Senior Revenue officer with the title of Revenue Representative [RT 76, 77], who maintained a regular staff of at least three assistants for this purpose, which staff was augmented by two more people detailed to Manila expressly to act against Stonehill and Brooks, who resided there.

Thus the analogy to cases where U.S. military agencies abroad exercise jurisdiction over United States citizens residing there, is compelling.

American citizens who are residents abroad (particularly in a country which observes constitutional and legal standards patterned after, and practically identical with, U.S. standards) are entitled to the protection of the Fourth and Fifth Amendments of the U.S. Constitution in proceedings seeking to enforce a liability for Federal taxes which Congress was able to impose only because of the Sixteenth Amendment of the same Constitution. A different holding would lead to absurd and unfair results.

It is respectfully submitted that "the Constitution follows the flag,"—not only the American flag that Mr. Chandler, the Internal Revenue Service officer displayed in the Internal Revenue Office in Manila where he collected taxes from American taxpayers, but also the American flag that the American appellants proudly displayed in their homes and offices in that same city.

The U.S. Supreme Court and the appellate courts of several circuits so hold.

In the leading case on this issue, *Reid v. Covert,* 354 U.S. 1, 77 S. Ct. 1222 (1957), the Supreme Court held:

> "At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.* This is not a novel concept. To the contrary, it is as old as government." [Emphasis supplied] (p. 5).

The United States in the instant case "acted abroad." It collected taxes. It collected evidence. It "reached out [for] a citizen who [was] abroad."

The Court in *Reid v. Covert* went on to say:

> "This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." (p. 8).

The Supreme Court enumerated cases in which some of the constitutional requirements had been enforced by the Supreme Court and other Federal courts on behalf of citizens residing abroad: *Balzac v. Porto Rico,* 258 U.S. 298, 312-313 (Due Process of Law); *Downes v. Bidwell,* 182 U.S. 244, 277 (First Amendment, Prohibition against Ex Post Facto Laws or Bills of Attainder); *Mitchell v. Harmony,* 13 How. 115, 134 (Just Compensation Clause of the Fifth Amendment); *Best v. United States,* 184 F. 2d 131, 138 (Fourth Amendment); *Eisentrager v. Forrestal,* 84 U.S. App. D.C. 396, 174 F. 2d 961 (Right to Habeas Corpus); rev'd on other grounds *sub.nom. Johnson v. Eisentrager,* 339 U.S. 763; *Turney v. United States,* 126 Ct. Cl. 202, 115 F. Supp. 457, 464 (Just Compensation Clause of the Fifth Amendment) (*Reid v. Covert, supra,* p. 8, ftn.10).

In *Kinsella v. Singleton,* 361 U.S. 234, 80 S. Ct. 297 (1960), in his concurring opinion, Justice Whittaker said:

> "The cases present grave questions and, for me at least, ones of great difficulty. Our recent decision in Reid v. Covert, 354 U.S. 1, makes clear that the United States Constitution extends beyond our territorial boundaries and reaches to and applies within all foreign areas where jurisdiction is or may be exercised by the United States over its citizens—that when the United States proceeds against its citizens abroad '[i]t can only act in accordance with all the limitations imposed by the Constitution.'" (p. 261).

The United States Internal Revenue Service clearly exercises jurisdiction abroad when taxing U.S. citizens who are permanent residents abroad. It exercises jurisdiction when it maintains offices abroad and dispatches agents to gather evidence abroad. It exercises jurisdiction when it instructs its agents to act "in liaison" with foreign police officers to gather information on U.S. citizens abroad. Chandler testified how he exercised jurisdiction abroad:

> "The Court: May I ask a question here? You were an investigative officer, weren't you, your prime duty was to make investigations?
>
> The Witness: No, my prime duty is to represent the Internal Revenue Service throughout the Far East. I did occasionally make—
>
> The Court: Let's see, now. The Internal Revenue Service is primarily interested in two phases; one is the collection of taxes, and the other is to make investigations. Now, you didn't have anything to do with the collection of taxes, I don't suppose?

The Witness: Yes, I did.

The Court: You were the collector?

The Witness: I was the collector, too.

The Court: All right. What else did you do? You were the collector, you made investigations; and what else did you do as a representative?

The Witness: Well, we tried to establish liaison with the tax authorities, police authorities, throughout the countries, to develop sources of information on American taxpayers. We did audit examinations, informal conferences prior to the appellate level, collection cases.

The Court: Part of that is investigation, isn't it?

The Witness: Yes. Informal conferences. We had a tax treaty up in Tokyo that our office in Washington is the competent authority for, we handled the matters back and forth between the Japanese government under the treaty. Once in a while the Intelligence Division wanted to know something out in the area, and we would make a collateral inquiry for them. We would initiate information according to what we heard in the area concerning the taxes of the Americans.

The Court: I assume from what you say that you did everything that the Internal Revenue wanted done in that particular area?

The Witness: Yes, sir." [RT 76-77].

This sweeping exercise of jurisdiction abroad over U.S. citizens there residing must be in accordance with constitutional limitations; it must be lawful in all its aspects. It can neither directly nor indirectly strip the U.S. citizen of his constitutional rights.

Powell v. Zuckert, 366 F. 2d 634 (CA DC 1966), involved the discharge of a civilian employee of the Army from his job with the Air Force in Japan.

> "The facts are undisputed. While employed by the Air Force in Japan [Powell] resided with his family at an off-base private dwelling. Armed with a Japanese search warrant obtained pursuant to a request by the Air Force Office of Special Investigations (OSI), OSI agents and Japanese officers searched appellant's home. The search was a general one, the Japanese warrant reciting that objects to be seized in the search included: 'Typewriters, United States property, official documents, memos, diary, documents, everything in relation to this case.'" (pp. 635, 639).

A Japanese search warrant in *Powell*—a Philippine search warrant in *Stonehill;* U.S. agents inspecting and obtaining the evidence seized both in *Powell* and in *Stonehill.* The Powell search warrant asked for ". . . documents, memos, diary, documents, *everything in relation to this case*"; the Stonehill search warrants called for "all books of accounts, financial records, vouchers, correspondence, receipts, ledgers, journals, portfolios, credit journals, typewriters and other documents and/or papers *showing all business transactions* . . ." [Exs. M-Z, AA-AL].

The Court in *Powell* held that the Japanese search warrant was illegal by Fourth Amendment standards (*ibid.,* at p. 640) without deciding whether it was legal under Japanese standards as the Government contended. In the instant case, the warrants are illegal under both United States *and* Philippine standards.

Powell also was a civil case. The Court suppressed the evidence on the authority of *Reid v. Covert, supra.* The *Powell* case did so without relying on participation or investigation, although it mentioned *obiter dictum* that U.S. agents had requested and participated in the search (at p. 640).

Reid v. Covert, Best v. United States, Kinsella v. Singleton and *Powell v. Zuckert* clearly establish that an American residing abroad is clothed with all the privileges and immunities that the United States Constitution grants him. The Government cannot try him without a jury; it cannot discharge him from his job on the basis of evidence obtained with the help of Japanese police under a Japanese search warrant that was illegal under the Fourth Amendment; it cannot tax him on evidence obtained with the help of Philippine police under a Philippine search warrant which was illegal under the Fourth Amendment.

United States involvement in the illegal search is not the criterion. It is the U.S. citizen who is *protected* by *Powell v. Zuckert,* not the Japanese officer (or even the OSI agent) who is to be *deterred.* It is the exercise of United States jurisdiction—court martial, civil service employment, taxation—which confers the protection and invokes the constitutional standard. Whether such standards are violated by Japanese or Philippine policemen matters not—the Federal Government may not avail itself of the fruits of the violation; it cannot do indirectly to the United States citizen abroad that which it cannot do directly, exercise jurisdiction over him without observing his constitutional rights.

D. THE FACTS AS FOUND BY THE DISTRICT COURT CONSTITUTE SUFFICIENT FEDERAL INVOLVEMENT TO MAKE THE SEARCHES IN SUBSTANCE SEARCHES BY FEDERAL AGENTS.

1. The District Court Should Have Granted Suppression on the Authority of Corngold v. U.S.

The District Court, after having found that the searches were illegal both under Philippine constitutional standards (274 F. Supp. at 424) and under U.S. constitutional standards (*ibid.*, at p. 426), was ready to hold on the authority of *Elkins v. U.S.*, 364 U.S. 206, that the evidence should be suppressed because:

> ". . . there would seem to be little distinction between illegal searches by state officers [Elkins] and illegal searches by foreign officials [Stonehill] when, as a result of such searches the U.S. District Court is required to rule upon the admissibility of the evidence seized." (*ibid.*, at p. 425).

Apparently, only this Court's decision in *Brulay*—misinterpreted by the District Court—prevented it from doing so.

The District Court held that *Elkins* established the post-1960 rule in "participation" cases (274 F. Supp. at p. 425). Actually, Elkins is the land mark case which did away with the requirement to show "participation" or "Federal involvement," under the theretofore prevailing "silver platter doctrine":

> "The question is this: May articles obtained as the result of an unreasonable search and seizure by state officers, *without involvement of federal officers,* be introduced in evidence against a defendant over his timely objection in a federal criminal trial?" (Emphasis supplied.) (364 U.S. 206, at pp. 208-209, 80 S. Ct. 1437 at 1439).

In *Elkins,* the Supreme Court answered this question in the negative. 364 U.S. at 223, 80 S. Ct. at 1447.

Therefore, under the theory of the District Court expressed in its opinion, that under *Elkins* evidence unconstitutionally obtained cannot be used in any federal proceedings, regardless of federal involvement or foreign source; all evidence regarding participation in the searches by federal officials became irrelevant and all findings relating to participation at least were practically *obiter dictum.*

It is for this reason, appellants feel, that the District Court made only limited findings of intermediate fact as to participation, although the case below was tried and briefed primarily on the participation issue.

As shown, *supra,* in section B of this argument, the logic of *Elkins* is compelling. The Supreme Court's holding in *Elkins* should indeed be interpreted to require suppression, regardless of whether the illegally obtained evidence was handed to U.S. agents on a "silver platter" by State police officers or on a "bamboo platter" by Philippine NBI agents.

But, assuming for the purpose of this section of appellants' argument, that the distinction made in *Brulay* between illegal searches physically conducted by police officers of one of the fifty States and illegal searches physically conducted by officers of a foreign country will be adhered to by this Court, the *intermediate* findings of fact on U.S. involvement that the District Court made, are sufficient to warrant an *ultimate* finding of fact and a conclusion of *law* that there was sufficient federal involvement in this case to make the searches "in substance a search by federal agents," requiring the application of this Court's *en banc* decision in *Corngold*

v. U.S., 367 F. 2d 1, rather than the application of *Brulay.*

The following intermediate findings of fact on U.S. involvement were made by the District Court:

1. "Meetings [between U.S. and Philippine officials] were held to determine the *modus operandi* of the raids." "Some of the[se] meetings were held in the home of U.S. Revenue Agent Robert Chandler" [274 F. Supp. at p. 422, par. 1, Col. 1; CT 46, lines 5-7].

2. "At one of the various meetings of . . . the Philippine National Bureau of Investigation (at which Robert Chandler was also present) the premises to be raided were mentioned." The Army-Navy Club was not included on the list of premises to be raised. *It was placed on the list and searched subsequently, only because* of the request or "suggestion" *of U.S. Agent Chandler.* [274 F. Supp. at p. 422, Col. 1, 2d par.; CT 46, lines 8-16]. (Appellants' most important personal and financial records were seized there and were ultimately turned over to the United States).

3. A diagram of premises occupied by two Stonehill companies was drawn by U.S. Agent Robert Chandler [Ex. J in evidence; *ibid.*, p. 422, Col. 1, 3d par.; CT 46, lines 18-26].

4. A memorandum relative to a building occupied by a Stonehill company, the Goodrich Building, was prepared by Robert Chandler prior to the raids (*ibid.*, p. 422, Col. 1, 3d para.) [CT 46, lines 22, 23].

5. Both Exhibits I and J, the diagram and the memorandum "thereafter came into possession of the Philippine National Bureau of Investigation." [*ibid.*, p. 422, Col. 1, 3d par., CT 46, lines 24-26].

6. Just prior to the raid a copy of one of the [42 identical] search warrants was shown to Robert Chandler, who, upon examining the document, stated that he knew nothing about search warrants but that the contents appeared to be all right [*ibid.*, p. 422, Col. 1, 4th par., CT 46, lines 29-32; CT 47, line 1].

7. In the course of the various meetings prior to the raids, Chandler was promised that he would be permitted to examine and copy the documents and records which the Philippine National Bureau of Investigation would obtain in connection with appellants' and their companies' activities [*ibid.*, p. 422, Col. 1, last par, cont'd into Col. 2, CT 47, lines 3-8].

8. On March 3, 1962, the day of the raid, Robert Chandler and two agents sent by Washington were stationed near a structure owned by the Philippine National Bureau of Investigation and waited there until that evening when they were requested by the NBI Director to come to his office to look at the documents and records seized by the NBI in the searches of appellant's premises [*ibid.*, p. 422, Col. 2, second par., CT 47, lines 9-23].

9. On the following day arrangements were made for Chandler to copy or photograph the records and documents seized [274 F. Supp., p. 422, Col. 2, 3d par., CT 47, lines 29-31].

The facts in *Corngold* were summarized by this Court in *Gold v. U.S.*, 378 F. 2d 588 (1967), at pp. 590 and 591:

"In *Corngold* government agents observed the defendant deliver packages to a Trans-World Airlines agent at the Los Angeles International Air-

> port. When the defendant departed, the government agents informed the transportation agent that they suspected that the packages contained smuggled watches and that they would like to inspect the shipment. They also pointed out that the shipper had incorrectly filled out the air waybill. The transportation agent testified that the government agents asked him to open the package. The employee initially opened one package while the government agents looked on, and then the agents completed opening the package. They found a number of small boxes inside the large package and removed and opened them. They found contraband watches and marked the small boxes for future identification."

These *Corngold* facts are parallel with, if not exceeded by, the above nine findings of United States involvement in *Stonehill* made by Judge Westover.

In *Corngold,* Government agents observed the defendant deliver packages to TWA; in *Stonehill,* their suspicions were aroused by the informer Spielman. In *Corngold,* the Government agents told the TWA agent they would like to inspect the shipment; in *Stonehill,* the District Court found as a fact that the key location (the Army-Navy Club) was searched only because of the U.S. agent's request, after meetings were held at his home where the "modus operandi" of all the searches were discussed. In *Corngold,* the Government agents asked the TWA agent to open the package; in *Stonehill,* the District Court found that Chandler drew diagrams of and memoranda regarding the premises to be searched. These diagrams included instructions to check and search for certain specific items [Deft. Ex. J]. The memorandum delivered to the NBI agents [Ex. I] included instructions to "confiscate" certain records and "take apart" a certain office.

In *Corngold,* the agents pointed out that the shipper had incorrectly filled out the waybill; in *Stonehill,* the agent pointed to unspecified Philippine violation of laws, examined the Philippine search warrants, and stated that they appeared to be "all right." In *Corngold,* the agents inspected smuggled watches and marked the boxes for future identification; in *Stonehill,* the trial Judge found as a fact that the agents were promised in advance that they could inspect and copy the fruits of the raid, that arrangements were made for them to do so, and that they did in fact inspect, mark for future identification and copy the seized material.

Of course, the facts as actually shown by the evidence in *Stonehill* are much stronger than those recited by the court in these limited findings of intermediate facts included in the Court's opinion. Appellants will so demonstrate in the last section of this argument.

In the above comparison, appellants limited themselves solely to facts as found by the District Court. The District Court's failure to take into consideration sealed Exhibit E and the plethora of other evidence of United States involvement it completely disregarded, emphasizes the importance of the above findings of fact which the trial judge included in his opinion.

These nine findings of fact excerpted from the Court's opinion, *supra,* in and of themselves clearly show that the District Court's conclusion of law—to the effect that there was no U.S. participation or instigation—is clearly erroneous. On the basis of these nine findings of fact alone, the District Court should have concluded that the searches were, in substance, Federal searches and that the evidence must be suppressed on the authority of *Corngold.*

2. Brulay Distinguished.

The District Court denied suppression on the authority of *Brulay v. U.S.*, 383 F. 2d 345 (1967). It is respectfully submitted that *Brulay* is distinguishable on the facts from the case at bar. More important, the rule of law laid down by *Brulay* is not what the District Court held it to be: a requirement that without a finding that the Stonehill searches were the result of U.S. *instigation,* there could be no suppression.

Henry Brulay, an American citizen and a resident of California, was stopped, arrested and his car was searched by two municipal police officers in Tijuana, Mexico. The arrest and search were brought about by the observation of Tijuana officers that the car "looked heavy in the rear," (338 F. 2d 345, 346). There was no action of any kind by U.S. agents which led to, or in any way caused the search to be made by the Tijuana municipal police. U.S. Customs Agents had alerted Mexican Federal agents but there was no finding by the Court, nor any showing on the record that the Tijuana Municipal policemen who made the seizure had been in contact with the Mexican federal police, let alone with the U.S. Customs Agents (at p. 348).[3] The facts in *Brulay,* therefore, show no U.S. involvement at all except the single telephone call. But this call was not traceable from the U.S. agents to the arresting or search-

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[3]Because of the importance of this factual distinction, appellants did not limit research to the reported decision in *Brulay,* but examined the record and briefs, including those filed in the Supreme Court. It appears uncontested that the federal Mexican police (not the Tijuana police) had been contacted by U.S. Customs officers a few days prior to the arrest (*Brulay record* pp. 26-28); the Tijuana officer appeared to have no knowledge of the U.S.-Mexican federal police communication (*Brulay record,* Vol. 2, pp. 14-17, 59), but stopped the automobile (having been assigned to investigate auto thefts) because it had been "going quite fast and appeared to be heavily loaded" (*Brulay* record, pp. 11-13, 17, 36-37—31-54; 36-57-58, volume 2).

ing officers. In *Stonehill,* on the other hand, the District Court expressly found as intermediate facts presearch meetings between U.S. and foreign agents at the U.S. agent's home, where the "modus operandi" of the searches were discussed, the selection of a key search location (Army-Navy Club) by the U.S. Agent, written instructions delivered to the foreign officers as to where to search and what to seize [Exs. I, J]—a far cry from the ineffectual B*rulay* telephone call.

Another important distinction between *Stonehill* and *Brulay:* In the case at bar, the searches were held to be illegal under the law of the country where they were made; in *Brulay* the officers making the search in Mexico were not violating Mexican law in stopping and searching the car and arresting Brulay (*Brulay* record, Vol. 2, pp. 14, 15, 17, 58-59) (383 F. 2d at p. 348).

In short, the facts in *Brulay* do not include *any* findings of U.S. involvement while in *Stonehill* the District Court expressly found nine instances of U.S. involvement.

Therefore, *Brulay* and *Stonehill* are completely distinguishable on the facts. But we respectfully urge that the District Court also misinterpreted the rule of law of *Brulay.* Misreading a small section of the *Brulay* opinion, the court gave unwarranted emphasis and meaning to the single word "instigation."

This court said in *Brulay* at p. 348:

> ". . . No United States officers participated in the questioning at or prior to the time of the seizure and although the customs agents of the United States had *alerted Mexican Federal* police to the defendant's activities, the Tijuana *municipal policemen who made* the seizure were not acting at the *instigation* of United States customs or narcotics officials." (Emphasis supplied).

It is clear from the emphasized language in the above excerpt from *Brulay* that the quoted part of the opinion is a mere finding of fact to the effect that it was the *federal* police who had been alerted and not the *Municipal* police, and that the Court in using the word "instigation" in this part of the opinion, did not intend to lay down a broad rule of law that evidence can be suppressed only if a defendant proves "instigation" of a search by U.S. officials. On the contrary, it appears to appellants that this Court used the words "acting at the instigation" in the second part of the above quoted sentence in the same sense as the word "alerted" in the first part of the sentence, in finding as a fact that because U.S. officials had alerted the Mexican federal police and not the Tijuana municipal police, Brulay could not possibly claim that the search was caused by the U.S. telephone call. The decision of this Court might have been different if Mexican Federal police, who had been in contact with the U.S. agents, had arrested Brulay, or if the Tijuana municipal policemen had done so in pursuance of the U.S. alert. But the Court never reached the question of quantity of U.S. involvement because *no* connection whatever between the U.S. call and the Mexican arrest was shown by Brulay.

Of course, this Court in *Brulay* did not intend to lay down a new rule requiring proof of "instigation" as the condition precedent for suppression. Nor did this Court use the word "instigation" as a defined or legal term (excluding all other Federal involvement). The Court did not overrule or even mention in *Brulay* its holding in *Corngold*. The rationale of *Brulay* that the Fourth Amendment is designed to deter federal and state policemen and that neither the Fourth nor the Fourteenth Amendments can be directed at Mexican officials, applies with equal force to the airline officials of *Corngold*. Federal *involvement* or non-involvement is

the criterion which both under *Brulay* and *Corngold* controls application of the exclusionary rule in Federal Courts, when illegal searches are not physically conducted by Federal or State officers. Federal involvement makes such illegal search, in substance, an illegal "federal search," *Corngold, supra,* regardless of whether this federal involvement consists of setting the search into motion (instigation), as defendant unsuccessfully contended in *Brulay,* or of being otherwise involved in it (participation) as in *Corngold.*

The uncontradicted and completely one-sided evidence before the District Court, however, showed both instigation *and* participation in *Stonehill.* The District Court committed a grave error in not so holding as a matter of law, as appellants will show in the next and last section of their brief.

One more distinction from the facts in *Brulay* is that most of the records involved in *Stonehill* are personal financial records of appellants. They are protected not only under the Fourth but also under the Fifth Amendment to the Constitution. *United States v. Jackson,* 322 F. 2d 460, CA 9 (1963); *United States v. Cohn,* CA 9 20921, decided Dec. 19, 1967, 9 Cal. Disc. Proc. 38 .... F. 2d ..... Under this Court's distinction between Fourth and Fifth Amendment violations abroad (*United States v. Brulay,* 383 F. 2d, at 349, n.5), the violation of the Fifth Amendment commenced by the illegal seizures in Manila, would be completed only upon admission of the records in evidence in the Federal Court and thus occur within the United States. For this reason these records are inadmissible even under *Brulay.*

E. THE UNCONTRADICTED EVIDENCE BEFORE THE DISTRICT COURT REQUIRES A FINDING OF ULTIMATE FACT AND CONCLUSION OF LAW THAT THERE WAS U.S. INSTIGATION OF, AND PARTICIPATION IN, THE ILLEGAL SEARCHES.

Appellants have shown that the District Court made nine findings of fact which on the authority of *Corngold* alone constitute "participation" by the U.S. federal agents in the illegal March 3, 1962 searches. Reading the forepart of the District Court's opinion, as reported at 274 F. Supp., pages 421, 422 and 423, and the first column of page 424 beginning CT 43 through line 14, of CT 52, one familiar with this Court's holding in *Corngold* and the Supreme Court's decisions in *Byars v. U.S.,* and *Lustig v. U.S.,* can expect only one conclusion of law: the "participation" by U.S. agents in the illegal searches of March 3, 1962, made the searches, in substance, searches by federal agents. After reading these findings of intermediate fact, and some of the Court's statements during the hearing, the completely unexpected and unsupported one hundred eighty degree turn by the District Court comes as an unexplainable shock.

During the hearing the Court said:

> "The Court: Now, there is no question but what the United States officials, the representative knew of the raid. * * * There is *no question* that they had *meetings, that Mr. Chandler participated in certain meetings in which the raids were discussed.* * * * Now, we have certain *instances where Mr. Chandler gave advice,* such *as including the Army and Navy Club.*"

The Court: I don't think there is any question that the United States authorities knew that there was going to be some sort of an action taken against Stonehill. It seems to me that the evidence would indicate that they *knew that there was a search to be made or seizure to be made in the immediate future.*" [Tr. 1243].

"The Court: And *I think I am going to have to find there was a participation.*" [Tr. 1243].

"The Court: It is true that they [U.S. agents] were consulted and it is true that they knew about the raids and it is true that, *I think we have at least two instances that there was participation,* that is, at one time; *at one time Mr. Chandler testified that there was a meeting and he was there at the meeting and he asked if they had included the Army and Navy Club and they said 'No,' and then he suggested that they include it* [and got key records which were turned over to the U.S.]. That is at least one example of participation." [Tr. 1196].

Without reference to any fact, the Court in the opinion suddenly made a determination that "[this] contention of instigation is rejected by this Court, as the evidence is clearly to the contrary." [274 F. Supp. 424, CT 52, lines 20, 21]. Similarly, in the next paragraph [CT 52, beginning on line 30, to CT 53, ending on line 7], the Court states, despite its own enumeration in the opinion of at least nine instances of participation:

"The record is unequivocal that neither Robert Chandler nor any other U.S. government official or employee participated in or was present at or a party to the raid conducted by the Philippine National Bureau of Investigation."

—all contrary to the Court's own findings in the forepart of the opinion. The conclusions are also contrary to the weight of the uncontradicted evidence before the District Court, which included instances of involvement by the federal agents freely admitted by them but completely disregarded in the written opinion of the District Court.

The only apparent basis on which the District Court appears to reject the overwhelming evidence of instigation and participation are its erroneous findings of intermediate fact that (1) "the Philippine officials had defendants under investigation for consummation of contemplated deportation proceedings" [p. 424, second column, second para.; CT 52, lines 21 through 23; 274 F. Supp. 420, 421; CT 45, lines 14 to 20]; (2) that the extent of any participation by Robert Chandler was knowledge that a raid was in contemplation of the Philippine authorities [p. 424, 3rd para.; CT 53, lines 1-4]; and (3) that Chandler "negated any procedure which included raiding" [CT 46, lines 1 and 2; p. 422 of the reported opinion, 1st column, top 3 lines].

The overwhelming and uncontradicted evidence of record shows that (1) the District Court's finding of a pre-existing deportation investigation is completely erroneous, and against the weight of all of the evidence; (2) that Chandler did not "negate" the searches, but only desired postponement thereof until his agents from Washington had reached Manila; and (3) that not only Chandler, but two other Revenue agents, Ragland and Reynolds, were physically and personally present during the raids, and physically and personally selected records to be seized. The U.S. agents directed and otherwise participated in, the illegal searches—to a degree unparalleled in the history of federal participation in searches made by non-federal officers.

(a) There Was No Pending Philippine Investigation of Appellants Prior to February or March of 1962.

The District Court's findings that for some time before Colonel Lukban's [January 7, 1962] interview with Mr. Spielman, "the Philippine National Bureau of Investigation had been engaged in gathering evidence for use in 'deportation proceedings' against Stonehill and Brooks" [274 F. Supp. 420, 421; CT 45, lines 14-20] and that "[t]he Philippine officials had defendants under investigation for consummation of contemplated deportation proceedings" [274 F. Supp. 424; CT 52, lines 21-23], are erroneous and against the weight of the evidence.

On the contrary, the uncontradicted evidence shows that there was no investigation or proceedings of any kind against Stonehill and Brooks pending before Lukban's interview with Spielman (the Embassy meeting of January 27) [RT 140-142]. Certainly no Philippine deportation proceedings were pending at that time. The first one to contemplate the deportation of appellants was not a Philippine official but the American Minister at the Embassy in Manila, who, on January 9, 1962, told Chandler that the American Embassy wants not only to get Stonehill out of the Philippines, but to keep him out [Ex. E]. It was the Embassy's opinion that appellant Stonehill had been very influential with the previous administration and would be even more so with the administration elected in November [Pl. Ex. 11; Def. Ex. E]. If deportation proceedings had even been contemplated by the Philippine authorities at that time, the Embassy would have known about it and certain Colonel Lukban, the NBI Director, would have mentioned it to Chandler on January 27.

The evidence shows:

(i) On January 9, 1962, the American Embassy decided to get Stonehill out of the Philippines. Although both the FBI agent and the IRS agent saw the new Minister of Justice socially in early January [Ex. 12, p. 19], and kept close liaison with Philippine law enforcement officers [RT 77], no Philippine proceedings of any kind against Stonehill were mentioned by any Philippine law officers at any time before February 1, 1962. Obviously, none were pending or contemplated.

(ii) Secretary Diokno, who had assumed office in January of 1962 first accepted the idea of a deportation proceeding some time in February of 1962 [RT 197], and then only for a limited purpose. According to U.S. agent Chandler's testimony, "deportation" was first mentioned by Diokno a week after the secret February 1 meeting in the Columbian Club between Chandler and the Secretary [RT 197-198]. Diokno told Attorney General Kennedy's assistant at Hong Kong that he would conduct the investigation "outside of ordinary Philippine Government channels." [Ex. AZ]. This is proof that the Philippine Government had no deportation or other proceedings pending against Stonehill and Brooks.

Still according to Chandler, the deportation charge was to be used by Diokno not (as the District Court erroneously stated in its opinion) for the purpose of deporting appellants as undesirable aliens (274 F. Supp. at 421) [CT 45, lines 19, 20], but as a pretext to make sure that appellant Stonehill could not get out on bail. Testifying about his discussion with Secretary Diokno held sometime between February 1 and February 8, "when [Diokno] made

this visit to [Chandler's] house" [RT 197], Chandler said:

"Q. Did he [Diokno] say he would arrest Mr. Stonehill at the time? A. Yes. He spoke of a deportation charge that he thought *would be the avenue* that he would move on. [Emphasis added].

Q. Did he give you the reason why he thought there would be a deportation charge and not a criminal investigation? A. Yes. He said the reason why there would be a deportation charge is because it was no bailable offense. He could not get out on bail." (Pp. 198-199).

(iii) That there was no deportation proceedings pending even as late as March 3 is also borne out by the text of the search warrants [Exs. M-Z; AA-A]. None of them mentioned deportation; none of them were issued by the Deportation Board or by or on the request of an immigration or other official concerned with deportation cases. On the contrary, the search warrants were made out on forms which had printed on them the words: "*Criminal* Case No. ...." and in the blank provided for the specification of the proceedings or investigation for the purpose of which the search was to be conducted, appeared the words: "Violation of Central Bank Laws, Tariff and Customs Code, Internal Revenue Code and the Revised Penal Code." Any reference to deportation proceedings was conspicuously absent.

(iv) There was no evidence that any section of the Department of Justice having anything to do with immigration, deportation or alien control, had any indication of a deportation proceeding until the very morning of the raids.

Major Del Rosario, the Secretary's "right arm," speaking about his activities on March 3, 1962,

beginning on RT 852, testified that on March 3rd, for the first time, Secretary Diokno presented deportation charges to the Under Secretary. The Under Secretary then and there "read them over" and signed the deportation warrants of arrest [RT 852, 853].

(v) Of course, Secretary Diokno, who had just taken office, could not have initiated any deportation proceedings, or even an investigation, against appellants prior to the end of January. The evidence is clear and uncontradicted that no one else, including his NBI chief who (not unlike the U.S. FBI chief) had served previous Secretaries of Justice had no investigation of appellants pending prior to the January 27 meeting. Here, again, from the mouth of the chief U.S. agent, Mr. Chandler, comes this testimony on the January 27, 1962 meeting, the first contact between U.S. and Philippine agents on the *Stonehill* case:

"Q. Now, Mr. Chandler, at or prior to the close of the meeting, did Colonel Lukban make any promises to Mr. Hawley and yourself with respect to further action? A. Well as to the—to us as a group, that is, Mr. Spielman, Mr. Hawley and myself; he said that he would inquire into it and that if Mr. Spielman's story was found to be correct, he would investigate it even if he had to go all the way to Malacanang [Philippine White House] to get it approved." [RT 143].

It is self-evident that Colonel Lukban, the Acting NBI Director, was speaking of an investigation that he might make in the *future*—not one that he had been conducting all along; an investigation that he could not or would not initiate even himself without the approval of his superior. This investigation was "promised" to Chand-

ler by Director Lukban on January 27, 1962. It had to be authorized first by Secretary Diokno. It finally was approved by President Macapagal of the Philippines on February 5, 1962. All of this transpired after (and we submit, *because*) the U.S. agents, beginning on January 27, 1962, "sold" the Philippines officials on the investigation.

(b) United States Officials Induced the Philippine Officials to Initiate the Investigation of Appellants.

Having shown that there was no antecedent Philippine investigation of appellants, appellants now turn to the evidence showing that Philippine action was triggered and induced, *i.e.* instigated, by the U.S. agents. The American decision to proceed against Stonehill and to get him out of the Philippines was made on January 9, 1962 [Ex. E]. Despite a Philippine inquiry to Chandler regarding Spielman, no contact with the Philippine agents was made by the Americans until seventeen days later—January 27. There is no apparent reason for the lack of candor toward the inquiring NBI Director or for the delay, if the U.S. agents desired only to inform the Philippine agents of possible Philippine violations of law when introducing the informer. The U.S. agents had extracted all they could from the informant, there was nothing further (IRS) could do, as of January 10, 1962 [Ex. E]. Why, then, the seventeen-day delay in informing the Philippine agents of Spielman's story or in presenting Spielman to them? The answer is very simple: Chandler (as he later testified) did not want the Philippine agents to make searches until Washington had complied with his request to send out agents to Manila who could evaluate the result.

Because of the District Court's persistent denial of Rule 34 motions for intra-governmental communications

and plaintiff's hiding behind an invalid "classification" of secrecy [see RT 214, *et seq.*], only a limited number of Manila-Washington, and no Washington-Manila, communications were made available to appellants. There is no doubt, however, that as explosive a communication as defendants' Exhibit E, dispatched to Washington on January 10, 1962, did not remain unanswered and that Chandler was assured either by telephone or written response, during the following seventeen days, that Washington would, indeed, honor his request and assign agents to Manila to assist in the investigation. Therefore, there is equally no doubt that the January 27, 1962 meeting at the Embassy was arranged to get the Philippine NBI sufficiently interested to make the searches as soon as, but not before, such assurances were received.

The use of the word, "promised" in Chandler's testimony [NBI Director Lukban "promised" the group to make an investigation and see whether the facts told by Spielman could be corroborated] indicates that it was a U.S. request for such investigation that was made in the Embassy on January 27th. The Philippine NBI "promised" to grant such request if there was some corroboration and if approval could be obtained from their superiors. Even on February 12, 1962, Chandler could report to the Minister at the Embassy only that the Director of the NBI and the Secretary of Justice had "expressed an interest"—not yet *agreed,* but at least expressed an interest—in "exerting both U.S. and Philippine law simultaneously" [Ex. G]. Secretary Diokno's assistant's testimony in the District Court that the Secretary had briefed him on the case on February 5th and that then he only *contemplated* to help the Americans to build a tax case against Stonehill corroborates this fact, as does Del Rosario's testimony to the effect

that even then, the Secretary had instructed him to commence no action until after Diokno had returned from Hong Kong. Only after that meeting did the U.S. effort to induce the Philippine officials to make the search, meet with success.

(c) Chandler Was Not Against Raids — He Only Desired Their Postponement.

The District Court's holding that "Chandler negated any procedure which included raiding," [274 F. Supp., top of p. 422; CT 46, lines 1, 2], and that "Robert Chandler plainly expressed his disapproval of raid procedures to obtain evidence for any purpose" [CT 52, lines 24, 25; 274 F. Supp. 424, Column 2], is contrary to the evidence. At best, Chandler "did not know whether the raid was a good thing or a bad thing" [RT 285]. The true reason for his attempt to dissuade the Philippine agents from immediate raids is revealed at p. 286 of the transcript where Chandler testified:

> "The decision, as I remember, was made by Diokno.[4]
>
> "Of course, this was not a good decision from our point of view. I didn't have any agents out there to work on the case. . . . I tried to dissuade them from going ahead . . . at an early date until we had somebody out to see what the things were all about . . ."

Or, on page 285:

> "Q. You didn't urge anyone to cancel the raids at any time? A. Not that I remember . . ."

In other words, all Chandler was concerned about was the timing of the raids. He did not want the Phil-

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[4]Not by Director Lukban, as the District Court stated in its opinion.

ippine authorities to "rush into" the raids [RT 190, line 17]. At least, "[he] wanted an agent out who could evaluate the case and let him handle it at that time" [RT 190, line 24].

Even on cross-examination, by Government Counsel, Chandler answered the question, "Did you try to dissuade him from ever conducting a raid?", in the negative, and again he added that he was mainly concerned to have a special agent out there to know what effect all this would have on the IRS case [RT 986].

A fair reading of all this evidence leaves only one conclusion: After Chandler and Hawley had induced the Philippine agents to make the investigation and to authorize raids and searches, the only opposition to such searches was one of timing, *i.e.,* not to rush into the raids until the U.S. could have experienced special agents out there who could make sure that the searches would not have the adverse effect on the case that they did have *i.e.,* that they would not be illegal. There is absolutely no logic in the District Court's holding that Chandler was against raids as such because there was no sense in his asking for two additional agents to be sent to the Philippines if all they had to examine were the hundred documents that Spielman had given him which Chandler knew were insufficient and not very good evidence. He desired searches, he asked for searches he got searches. His "dissuasion" centered only on Diokno not 'rushing" these searches.

(d) Diokno's Hong Kong Meeting With the U.S. Department of Justice.

The District Court completely disregarded and in its opinion did not mention Secretary Diokno's special trip to Hong Kong to meet Attorney General Kennedy and Exhibit AZ, the top secret report of this meeting.

The subject of a Kennedy meeting came up as early as February 1st when Chandler first told Secretary Diokno at the Columbian Club that he needed evidence in order to proceed with a U. S. tax case against appellant Stonehill [RT 158-159]. This was tantamount to a request for assistance. This meeting with Kennedy was demanded by Diokno before he was going to "stick his neck out and authorize action against (appellants)" [RT 161-162]. He desired to ask Kennedy for simultaneous action in the U. S. and to assure the presence of U. S. experts to evaluate the results of the searches [Ex. A-Z]. Diokno met Kennedy's Executive Assistant since the Attorney General's schedule did not permit a personal conference. He promised Kennedy's assistant that he would take action against appellants *"outside Philippine government channels."* (Emphasis added.) Upon his return on February 13, Diokno authorized the searches to be made on February 24th [RT 164].

This entire sequence of events and the very important Exhibit A-Z was completely disregarded in the Court's opinion.

(e) Planning and Preparation of the Searches at Chandler's Home.

The District Court did find as a fact that the "modus operandi" of the searches was discussed at Chandler's home. Chandler himself testified that the locations to be raided were the main subject of the pre-raid meetings [RT 149], and that "specific locations of documents and records in the premises to be searched were the subject of discussion" [RT 278-280].

Secretary Diokno himself came to Chandler's house to discuss the seizure of appellants' records [RT 197-199] and Chandler's home apparently became the headquarters for the entire raid planning because the NBI,

which was tapping appellants' phones, brought current recordings to the house, which were then played and listened to by everyone, including Chandler [RT 149-150].

(f) The U.S. Agents' Active and Physical Participation in the Raids.

The Court is respectfully urged to examine Exhibits I and J. Chandler freely admitted that Ex. J was written by him. Exhibit I is headed, "U.S. Tobacco Company —Picture Folder." He admitted that he "had a vague recollection of seeing some pictures the NBI took" [RT 341] and that the words, "Comments on USTC Picture Folder" might well have been written by him while looking at such a picture folder [RT 1076], Major Del Rosario testified that he had seen an NBI picture folder and that the photographs had been made by the NBI prior to the raids [RT 862, 866-867].

Exhibit I has only one grammatical and logical interpretation: they were instructions added by Chandler to the NBI picture folder, telling the agents what to seize, *e.g.,* "confiscate records in separate small adjoining building." Asked specifically with regard to this exhibit, Chandler stated:

> "Q. And you did this to help with the raids? Is that correct? A. I presumed that it would probably be used in the raids, yes." [RT 366].

Exhibit J, sketches of two buildings used by Stonehill companies, includes four instructions to raiders: "Check cigarette cases for stamps; check dummy wall for door; rolls of paper to be checked," etc.—all in Chandler's handwriting. Testimony by two witnesses who were present during the raids, Farb [RT 748-749] and Miss Zubiri [RT 639-642, 643, 644, 645], brought out that the raiders closely followed Chandler's instructions, as given on Exhibits I and J—another fact that was completely disregarded by the District Court.

(g) Chandler's Visit to NBI Director Lukban's Home the the Night Before the Raids.

The District Court mentioned that just prior to the raid, a copy of one of the search warrants was shown to Chandler and that he stated that the language appeared to be "all right" [274 F. Supp. at 422; CT 46, line 32; CT 47, line 1].

This finding hardly does justice to the circumstances under which Chandler approved the language of the search warrants. According to his own testimony, he was brought by Assistant NBI Director Nocon late in the evening of March 2 and followed Nocon to NBI Director Lukban's house [RT 300]. He was introduced to the team leaders who were going to take charge of individual groups of raiders, then assembled in the basement [RT 303-304]. Colonel Lukban asked him to look at the search warrants then being typed by Lukban's assistant, Nocon [RT 311-316]. After reading one of them, which was representative of all (the search warrants were in practically identical language and all of them required the seizure of "books of accounts, financial records, vouchers, correspondence, receipts, ledgers, journals, portfolios, credit journals, and other documents and other papers showing all business transactions" [Exs. M thru Z; Exs. A thru AL], he said that they sounded "all right" to him [RT 311-312]. Small wonder: the evidence commanded to be seized of course had no significance for deportation proceedings. It was the very evidence that Chandler had told Secretary Diokno, Major Del Rosario, and Colonel Lukban was needed by him for a U. S. net worth tax case [RT 328; 847, 848, 923, 924]. The Philippine law enforcement officials did not need this type of evidence. They were not interested in any tax case against appellants [RT 848] and no Philippine Bureau of Inter-

nal Revenue agent took any part in the investigation [RT 385]. Therefore, even though Chandler did not know much about search warrants, as the District Court found, the list of items to be seized certainly sounded "all right" to him. Nocon of course did not read the warrant to Chandler to ascertain whether it was legal under Philippine law. He read it only to ascertain whether the list of documents to be seized was "all right" with Chandler. It was.

(h) Chandler's Selection of Room 304, Army-Navy Club for Search.

The District Court Found that it was Chandler who placed the Army-Navy Club[5] on the list of locations to be searched. The District Court failed to observe that this room was the location where appellant Stonehill kept most of his confidential and personal papers [RT 679-680], and that Chandler himself had checked the location prior to the raid and was solely responsible for it having been found and searched [RT 346]. The trial Judge stated during the hearing that he considered this selection of a search target an act of "participation" in the raids [RT 1196]. In his opinion, however, he failed to do so, without reason. *The documents and records seized at the Army-Navy Club at Chandler's request were subsequently turned over to U.S. agents!*

It is respectfully submitted that the personal selection of an important location for a raid is a clear act of instigation and participation, and is absolutely equivalent to, and indistinguishable from, the Customs agents' selection of the package of watches in *Corngold,* and his request to the TWA agent to open the package. In

---

[5]Not the Army-Navy "Building," as erroneously described in the Court's opinion, 274 F. Supp. at 422; CT 46, line 16.

Corngold, the package picked out by the U.S. Agent was opened and searched. In *Stonehill*, the room picked out by the U.S. agent was opened and searched. In both cases, the evidence resulting from that search must be suppressed.

(i) Supervision of the Raids by Chandler, Physical Presence and Participation by U.S. Agents in the Searches and Seizures.

Armed with pencils and analysis paper to copy records, U.S. agents Chandler, Reynolds and Ragland stationed themselves at the Arson Squad Building of the NBI on Saturday, March 3, 1962, in accordance with a pre-arrangement with NBI Director Lukban [RT 280, 281, 282, 287].

Thereafter, Chandler observed the progress of the raid of a private office rented by Stonehill which was located in the former Cuban Embassy [RT 393, 394]. Thereafter, he drove to various other places where raids were in progress [RT 400]. Finally, as the District Court found, the agents were called to the NBI Director's office at about 10:00 P.M. on that day [RT 1170].

But the District Court completely disregarded the imporant fact that right after the visit with Colonel Lukban, Chandler, Reynolds and Ragland, in their U.S. Jeep, went to a Stonehill company warehouse, after being told by Director Lukban that "there were tremendous quantities of records there." When they arrived, the raids were in full swing and a number of NBI agents were there searching. According to Chandler's own testimony, all three U.S. agents went into a walled-off section of the area raided, examined records there located, and put in cardboard cartons "whatever they

thought was important" [RT 406]; important to the U.S.!

> "Mr. Lukban then approached us and stated that a large quantity of records had been seized in a warehouse, U.S. Tobacco Company warehouse, and his personnel were primarily lawyers and were not trained in accounting, did not recognize accounting records, and wondered if we could help identify the more important information in those records." [Tr. 1142].
>
> * * *
>
> "Yes. We agreed to go with the agent and identify the more important accounting records." [Tr. 1143].
>
> * * *

Both Chandler and Ragland testified that Chandler made a general survey and search of the warehouse [RT 304, 305; 1145], while Ragland confirmed that "all of them examined the records and picked out the more important ones" [RT 1145].

Thereafter, the three U.S. agents went to the main office of the U.S. Tobacco Co., because (as Chandler testified) he thought "that the NBI's execution of the raids was handled in a rather disorganized manner" [RT 414]. There, Chandler met the team leader in charge [RT 413-414], was invited to enter the building and inquired whether the NBI had found certain records stored behind the main office of the U.S. Tobacco Co. [RT 414-415]. Unable to explain to the team leader the exact location, Chandler went into the building and physically pointed it out to him [RT 415].

The District Court completely disregarded this evidence of physical, actual participation by the U.S. agents

in the raids of March 3, 1962. There is no conflict of evidence, as to these acts of physical participation. The U.S. agents themselves testified to them. The District Court's disregard of this evidence is clearly erroneous.

It is respectfully submitted that on this overwhelming and one-sided evidence, the District Court's conclusion of law that there was no instigation or participation by the U.S., is untenable and must be reversed.

The U.S. District Court for the Southern District of New York in *United States v. Stonehill*, 254 F. Supp. 1004 (the criminal case), subsequently dismissed, ordered a hearing to determine whether Chandler's and other government agents' participation in the searches made these searches, in effect, Federal searches, although conducted outside the United States. As authority for its order, the District Court cited *Byars v. U.S.*, 273 U.S. 328, 47 S. Ct. 248, 71 L. Ed. 520 (1927), and *Lustig v. U.S.*, 338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949).

The above cited New York *Stonehill* decision, made on April 27, 1966, of course preceded this Court's *en banc* decision in *Corngold* of September 29, 1966, and therefore used the pre-*Elkins* parallels of Federal participation in *state* searches as authority for ordering the hearing.

To show most dramatically the parallelism of the instant case with *Byars* and *Lustig*, we respectfully call the attention of the Court to the attached comparison of the facts in *Stonehill* with those in *Lustig* and *Byars* (Appendices B and C). This comparison is particularly persuasive because this Court's opinion in *Corngold*, as was the New York Court's opinion in *Stonehill*, is primarily based on the authority and participation standards of *Byars and Lustig* (367 F. 2d at p. 6).

The *quantum* of Federal involvement or participation in a State search required to make such search in substance a Federal search has been the subject of several Supreme Court and Circuit Court decisions. The first was Byars which held:

> "While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods."
>
> *Byars v. U.S.*, 273 U.S. 28 (1927), at p. 32.

Anything but "mere" or "bare" unofficial presence of a Federal officer at a State search was held by Byars to amount to such participation as to make the search a Federal search provided that the search produced evidence in which he, the Federal officer, had an official interest in the results. 273 U.S. at page 32.

The Federal agents in *Stonehill* were present throughout in an official capacity. They had arranged beforehand to obtain the results of the illegal searches.

The three cases cited by the Supreme Court in *Byars* as authority for suppression, *Flagg v. U.S.*, 233 Fed. 481 (C.A. 2, 1916), *United States v. Falloco*, 277 Fed. 75 (DC WD Mo., 1922), and *Legman v. U.S.*, 295 Fed. 474 (C.A. 3, 1924) involved no physical presence of the Federal officer at the State search and turned either on pre-search cooperation or post-search turning over of evidence.

In *Gambino v. U.S.*, 48 S. Ct. 137, 275 U.S. 310 (1927) there also was no Federal physical presence at the search. Evidence was suppressed because the State officers were in fact enforcing a Federal law and were seizing evidence to turn over to Federal prohibition officers. In the *Stonehill* case, the Philippine officers were

in fact enforcing U. S. tax laws and seized evidence to turn over to the U. S. officers for this purpose.

Finally, in *Lustig v. U.S.,* the Federal officer, seeing no evidence of a Federal crime, caused a municipal officer to make an illegal search while waiting at police headquarters to see what the search would turn up. Only after the search was completed did the Federal officer, together with the city officer, gather up some of the evidence which was later turned over to him. On these facts, the Supreme Court declared this was, in substance, a Federal search, and interpreting *Byars v. U.S., supra,* said, "The crux of [the Byars] doctrine is that a search is a search by a Federal official if he had a hand in it . . ."

The Federal officers in *Stonehill* certainly "had a hand" in the searches and seizures; actually, as shown in Appendix C, the facts relating to involvement of the Federal officers in the search of *Stonehill* are not only parallel to the acts of participation in *Lustig* but substantially exceeded in number and gravity those which the Supreme Court considered sufficient to make the *Lustig* search a Federal search.

The parallelism of *Stonehill* with *Corngold, Byars* and *Lustig* is so compelling that further argument appears unnecessary. For the sake of completeness, appellants now turn to *Birdsell v. U.S.,* 346 F. 2d 775 (1965), also a Mexican search case which was cited by this Court in *Brulay.*

There are four main points of distinction between *Birdsell* and *Stonehill:* First, the *Birdsell* record "supported a finding that Birdsell was not arrested until after the search and that he consented to the search" (346 F. 2d at 782); there certainly was no consent in *Stonehill.* Second, the search in *Birdsell* "might well meet Fourth Amendment standards;" in *Stonehill,* the

Court found it did not. Third, in *Birdsell,* the issue was not raised by a pre-trial motion as required, 346 F. 2d at 782; here, it was. Fourth, in *Birdsell* there was no showing that under the Mexican law or constitution or under any statutes or rules equivalent to the Fourth Amendment, the arrest and searches were unlawful. In *Stonehill,* the Philippine constitution and laws are patterned after the U.S. Constitution and laws and the searches were held to have been illegal under both the Philippine and U.S. Constitution.

In *Birdsell,* in footnote 10 on page 782, the Court specifically held:

> "We do not mean to say that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers over the administration of federal justice, might not refuse to allow the prosecution to enjoy the fruits of such action."

But the Court in *Birdsell* specifically found that the evidence there was a "far cry" from shocking the conscience.

It is respectfully submitted that in the instant case the evidence indeed was such that it must shock the conscience of a Federal Court. This Court therefore should refuse to allow the plaintiff to enjoy the fruits of the actions of its agents. To permit the evidence to be used would be equivalent to acquitting the instigator, planner and participator in a murder because he did not pull the trigger. Affirmance of the District Court would, in fact, *invite* violation of constitutional rights by subterfuge, and be contrary to this Court's holdings in *Taglavore v. U.S.,* 291 F. 2d 262, 266 (CA 9 1961), *State of Montana v. Tomich,* 332 F. 2d 987, 989 (CA 9 1964), and *Lenske v. United States,* 383 F. 2d 20 (CA 9 1967).

In the instant case, the resort of the federal agents to "subterfuge and evasion" sought to be deterred by *Elkins* and their unconstitutional conduct—all shocking to the conscience of any federal court,—were exposed. U.S. federal agents who now, in one form or another, exercise jurisdiction over American citizens all over the world must be deterred by this Court from violating the constitutional rights of American citizens through the surreptitious use of foreign police, who are dependent on U.S. aid for training and cooperation. The Constitution and the cases cited herein so require.

VI.
CONCLUSION.

For the reasons above stated, it is respectfully submitted that the District Court's order should be reversed, with directions to suppress all evidence directly or indirectly resulting from the searches of March, 1962.

TRAMMELL, RAND & NATHAN and
BERTRAM H. ROSS,
By BERTRAM H. ROSS,
Attorneys for Appellants.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

BERTRAM H. ROSS

APPENDIX A.

Index of Exhibits.
(Rule 18(f)).

Defendant's Exhibits	For Identification	In Evidence
A	87	96
B	113	117
C	117	—
D	133	447
(remarked Plaintiff's Exhibit 11)	975	977
E	236	296
F	241	463
G	257	259
H	344	—
I	349	352
I(a)	1081	1083
J	360	364
J(b)	1081	1083
JA	365	1070
K	418	—
L	419	—
M	482	529
N	489	529
O	490	529
P	491	529
Q	492	529
R	493	529
S	495	529
T	495	529
U	496	529
V	496	529
W	498	529
X	499	529

Defendant's Exhibits	For Identification	In Evidence
Y	500	529
Z	500	529
AA	501	529
AB	502	529
AC	502	529
AD	504	529
AE	505	529
AF	508	529
AG	508	529
AH	509	529
AI	509	529
AJ	509	529
AK	510	529
AL	510	529
AM	514	515
AN	530	537
AO	537	539
AP	578	583
AQ	578	583
AR	726	727
AS	736	738
AT	759	764
AU	761	766
AV	765	—
AW	932	938
AY	938	951
AZ	977	1216
BA	1058	—
BB	1168	1169

Master Index.

Plaintiff's Exhibits	For Identification	In Evidence
1	454	457
2	454	—
3	562	—
4	584	586
5	623	—
6	715	—
7	724	725
8	797	798
9	—	799
10	—	815
11	—	977
12	—	1201

APPENDIX B.

Comparison of Facts in Byars v. U.S. With Facts in the Instant Case.

BYARS	STONEHILL
"The facts attending the search are in substance these:	In *Stonehill,* some of the warrants had been prepared by Danny Nocon when Federal Agent Chandler entered NBI Director Lukban's house during final preparations for the raids [RT 305-306; 311-316]. The warrants were read to Chandler who approved the language [RT 311-312]. Chandler requested that a warrant issue for 304 Army-Navy [RT 1008-1011], and his request was honored. All warrants called for evidence Chandler had requested. [Exs. M thru Z; AA thru AL], Chandler having told the NBI previously what he desired [RT 328; 847-848; 923-924].
The warrant had already been issued upon application of the police department, as heretofore stated, and the officer in charge of the night liquor bureau of the police station was perfecting his arrangements for the search, when one R. C. Adams, federal prohibition agent at Des Moines, entered the station."	
* * * * *	* * * * *
"Adams had no previous knowledge of the warrant nor of the contemplated raid, and had had no conversation or understanding	Chandler knew of the raids and even their specific date and hour, long ahead of time [Ex. AZ; RT 271-399]. He had con-

with the police officers concerning the enterprise."

* * * * *

"The officer in charge, finding his force insufficient, impressed Adams into service. To the question 'Where are you going?' the officer replied, 'Take your car and follow me.' Upon arriving at the premises to be searched the men in the raiding squad were assigned to different rooms."

* * * * *

"Adams searched the kitchen; he there found the stamps charged in the first count of the indictment."

* * * * *

stant conversations and arrived at an understanding with the police officers during the 12 to 15 meetings at Chandler's home [RT 273], at the Department of Justice, NBI Hqs. and elsewhere [RT 847-848]. He had a prior understanding with Lukban that the seized records would be made available to him for inspection and copying [RT 989; 1004-1005].

According to Chandler, Director Lukban requested him to take his car and follow another agent to the warehouse in the Port Area in Manila, where there were tremendous quantities of records; to sort these records and to see what ought to be brought back to NBI Hqs. [RT 402 thru 417]. The raids were still in progress when Chandler did so [*Ibid.*].

* * * * *

Chandler and Ragland searched the Goodyear warehouse and found their financial records of U. S. Tobacco Corporation in

"Those covered by the second count were found by the state officers in another room. All were subsequently turned over to the government."

which Stonehill had an interest. Whatever they thought was important they put in a cardboard carton [RT 406].

* * * * *

Other records involved in another part of this case were seized by NBI officers in different locations, including the Army-Navy Club specifically selected by Chandler. All records sought to be suppressed were subsequently turned over to the Federal agents [RT 1153, 1154, 1159, 1160].

* * * * *

APPENDIX C.

Comparison of Facts in Lustig v. U.S. With Facts in the Instant Case.

LUSTIG	STONEHILL
"At about 2 p.m. on Sunday, March 10, 1946, Secret Service Agent Greene received two telephone calls, one from the police of Camden, New Jersey, the other from the manager of a hotel in that city, indicating violations of the counterfeiting statutes being carried on in Room 402 of the hotel."	On Monday, December 18, 1961, FBI Agent Hawley introduced Spielman to IRS Agent Chandler, because Spielman had information that might be helpful to a U.S. Tax case [RT 97-99].
* * * * *	* * * * *
"On looking through the keyhole of the suspect room after reaching the hotel, Greene saw Lustig, two brief cases and a large suitcase, but no evidence pertinent to counterfeiting. He questioned the chambermaid whose suspicions had led to this investigation. She recounted the hearing of noises 'like glass hitting against glass or metal hitting against metal' emanating from the suspect room. She also remarked that she had seen what looked like money on the table."	Chandler looked at documents Spielman had given Hawley [RT 134-135] and interviewed Spielman daily, either in Chandler's office or at Chandler's house [RT 112-113; 122].
* * * * *	* * * * *

"Greene thereupon reported to Detective Arthur of the Camden police at the Camden Police Station that he had seen no evidence of counterfeiting but was confident that 'something was going on.'"

* * * * *

"Arthur reported the affair by telephone to his superior, Captain Koerner, at his home, who then came to the police station."

* * * * *

"In his account of the affair Greene gave to Koerner the names under which the occupants of the room had registered."

* * * * *

The "Lustig" police proceeded without help or instructions to prepare for the raids.

No pre-raid Federal-State cooperation or agreements.

* * * * *

Having obtained all the information Spielman had by January 10, the Federal Agents realized they hadn't any "really good evidence," and sometime thereafter Hawley called Director Lukban of the Philippine NBI and arranged for a meeting on January 27 [RT 139], during which meeting Lukban was told what "was going on." [RT 140].

* * * * *

Lukban reported the affair to his superior, Secretary Diokno [RT 151].

* * * * *

Chandler and Hawley met Diokno, and in their account of the affair, gave Diokno the information they had, stating however, that evidence had to be developed [RT 159].

* * * * *

Now, "Stonehill" differs from "Lustig." In Stonehill, Chandler helped with the detailed planning in many meetings at his home [RT 273-274] or at the Philippine Government of-

"At about four o'clock in the afternoon of the afternoon of the same day Koerner [the captain] and three detectives secured a key from the manager of the hotel and entered Room 402. The police officers proceeded to empty the bags and the drawers of a bureau and thus came upon the evidence sought to be suppressed. What they found indicated counterfeiting of currency rather than of racetrack tickets."

* * * * *

"During all this time, Greene had remained at police headquarters because he 'was curious to see what they would find.'"

* * * * *

fices [RT 847-848]. He pointed out what evidence he needed [RT 847-848] and gave written instructions as to what to seize [Exs. I and J].

* * * * *

At Chandler's insistence Philippine raiders searched Room 304 of the Army-Navy Club [RT 346] in addition to other locations previously agreed upon during the meetings at Chandler's house [RT 121, 149] and approved by him, when Danny Nocon went over the 24 locations selected with Chandler at Colonel Lukban's house the morning of the raid [RT 1008-1011].

* * * * *

During the raids, Chandler, Ragland and Reynolds were either in the NBI headquarters complex at the place assigned to them by Lukban [RT 377-378, 400] or drove to the raid locations to observe their progress [RT 394] "out of curiosity." [RT 413].

* * * * *

"On finding what they did find, Koerner sent word to Greene, who came to the hotel and examined the evidence in controversy."

* * * * *

"After the search was completed, Greene *and the city police* gathered up the articles revealed by the search and carried them to the police station. *Some* of these articles were given to Greene before he left Room 402; *all* were *eventually* turned over to him."

* * * * *

"We therefore accept as a fact that Greene did not request the search, that, beyond indicating to the local police that there was something wrong, he was not the moving force of

At 10:00 p.m., Lukban sent word to Chandler, who came to NBI headquarters, then went to the Goodyear warehouse, selected and examined accounting records there while the raid was still in progress, went on to other raid locations and later again to the NBI building and examined the evidence in controversy [RT 1170; 402, 403, 406; 416, 417; 646-650; 412-415; 417, 418, 423, 426, 1037].

* * * * *

The Internal Revenue Service agents *and the NBI* gathered up the articles revealed by the search. The NBI carried them to headquarters. *All* the evidence sought to be suppressed was eventually turned over to United States agents [RT 406; 1037; 1159-1160].

* * * * *

In *Stonehill,* the case of participation is much stronger on this particular point because we cannot accept the Government's contention that Chandler "did not request the

the search, and that the search was not undertaken by the police to help enforcement of a federal law."

* * * * *

"It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution, or the federal agent himself takes articles out of a bag. It would trivialize law to base legal significance on such a differentiation."

* * * * *

"Had Greene accompanied the city police to the hotel, his participation could not be open to question even though the door of Room 402 had not been opened by him."

* * * * *

"To differentiate between participation from

search." On the contrary: he was the moving force and the search was undertaken by Diokno, "outside of ordinary Government channels" [Ex. AZ] to help enforcement of a U.S. Federal law.

* * * * *

It surely can make no difference whether the NBI officer turned up the evidence and handed it over to the Federal agents for their critical inspection with the view to its use in the federal tax case, or the Federal agents themselves took the articles from Room 304, Army-Navy Club or the former Cuban Embassy. It would trivialize law to base legal significance on such a differentiation.

* * * * *

Had Chandler accompanied the NBI to the Army-Navy Club, his participation could not be open to question even though the door of Room 304 had not been opened by him.

* * * * *

Chandler certainly participated in the illegal

the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in Byars v. United States, supra, 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520.

"The crux of that doctrine is that a search is a search by a federal official if he had a hand in it."

* * * * *

search from the beginning, even its conception. He joined it physically before it had run its course and he and other United States personnel "had a hand in it."

* * * * *

No. 22346

In the United States Court of Appeals for the Ninth Circuit

HARRY S. STONEHILL AND ROBERT P. BROOKS,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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FILED

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In the United States Court of Appeals for the Ninth Circuit

No. 22346

HARRY S. STONEHILL AND ROBERT P. BROOKS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The Order Denying Motion to Suppress of the United States District Court for the Central District of California (R. 43–57)[1] is officially reported at 274 F. Supp. 420 (S.D. Calif.).

JURISDICTION

On January 25, 1965, the United States of America instituted the suit in the Court below by filing a complaint which sought the foreclosure of federal tax liens securing federal income tax liabilities outstanding against Harry S. Stonehill and Robert P. Brooks for the years 1958 through 1961, inclusive. (R. 67.)

[1] "R." references are to the reproduced record.

The taxpayers raised by motion the issue that certain evidence which the Government had in its possession should be suppressed at the trial of these tax liabilities as being obtained by the United States in violation of the taxpayers' right under the Fourth Amendment to the Constitution. (R. 2.) The trial court severed and tried this issue apart from the other issues in the case on June 13, 1967. (R. 73.) On October 16, 1967, the trial court entered its interlocutory order denying the taxpayer's motion and deciding this issue for the Government. (R. 43.) Thereafter, the trial court on October 23, 1967, certified the order of October 16, 1967, pursuant to Section 1292(b) of Title 28 of the United States Code. (R. 58.) The taxpayers then petitioned for and obtained from this Court permission to prosecute an appeal from the order of October 16, 1967, pursuant to Section 1292(b) of Title 28 of the United States Code. (R. 60.) Jurisdiction is conferred on this Court by Section 1292(b) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether the trial court's finding that there was no participation by United States officials in the raids conducted by Philippine authorities on the businesses managed by the taxpayers is clearly erroneous.

2. Whether evidence obtained in violation of the taxpayers' rights under the Fourth Amendment can be used to impeach testimony and statements offered by the taxpayers in their tax returns and at the trial on the issue as to their liability for taxes.

3. Whether the taxpayers have standing to move to suppress evidence consisting of corporate documents obtained by Philippine officials in raids upon Philippine corporations of which the taxpayers were stockholders.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States:

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants, shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The instant action was instituted by the Government to foreclose tax liens and collect federal income tax assessments outstanding for the years 1958 through 1961 against the taxpayers Harry S. Stonehill and Robert P. Brooks. (R. 49–50.) During the tax years in question, the taxpayers resided in the Philippines, and the tax investigation which was the basis for the tax assessments involved in this suit, had its inception in the Philippines. (R. 43–57.) In the initial stages of the tax investigation a substantial amount of evidence, consisting of business records of the taxpayers and of various corporations of which the taxpayers were officers and stockholders, was obtained from the Philippine National Bureau of Investiga-

tion;[2] and that organization in turn obtained this evidence from raids upon the taxpayers' offices as well as upon the offices and premises of at least 16 Philippine corporations. (R. 47; Deft. Ex. AW.) The Supreme Court of the Philippines on June 19, 1967, ruled the applications for the search warrants, pursuant to which these raids were conducted, were invalid. (Deft. Ex. AW.)

The taxpayers moved[3] the trial court to suppress evidence obtained from the NBI on the grounds that the evidence was seized in raids in which the United States officials participated, and that the raids violated the taxpayers' constitutional rights under the Fourth Amendment. (R. 52–53.) The trial court severed this issue from the other issues present in this suit and brought this issue on for trial on June 13, 1967. (R. 73.) At this trial, the following facts were established.

In August of 1960, the federal income tax return of Harry S. Stonehill for the calendar year 1958 was sent for audit to Robert Chandler, who was attached to the United States Embassy in Manila, Republic of

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[2] Hereinafter designated as the NBI.

[3] In support of this motion, the taxpayers filed an affidavit executed by counsel for the taxpayers. (R. 7–30.) The Government moved to strike this affidavit (R. 31), however, the trial court denied this motion without prejudice, inasmuch as it was severing this issue and holding a separate trial on it, stating that it would disregard all such hearsay testimony in trying this issue. (Reporter's trial transcript, p. 27; hereinafter, all references to the reporter's transcript of the trial beginning June 13 through June 23, 1967, will be designated by the notation "Tr.") Despite this ruling of the trial court, the brief for the appellants makes references to matters which are hearsay and are found only in that affidavit.

the Philippines. (R. 44; Tr. 70–71, 81.) Robert Chandler was the Internal Revenue Service Representative for the Far East, and his duties included liaison work with various foreign government agencies in his territory, as well as auditing returns of and collecting taxes from American taxpayers residing in his territory.[4] (Tr. 76–77, 439.) However, Mr. Chandler did not have the authority to initiate a fraud investigation; only a Special Agent for the Internal Revenue Service could initiate such an investigation. (Tr. 439.) With respect to the Stonehill income tax return for 1958 which was referred to him for audit, Mr. Chandler initially advised his office that this audit would not be assigned and undertaken, because of work load problems, until additional agents were assigned to his office. (R. 44; Tr. 81–85; Deft. Ex. A.)

Thereafter, nothing was done with respect to any audit of the taxpayers until December of 1961, when Menhart Spielman, vice-president of United States Tobacco Corporation, which was owned and controlled by the taxpayers, contacted Mr. Chandler and Robert Hawley, a Federal Bureau of Investigation agent attached to the American Embassy in Manila. (Pltf. Ex. 11, p. 1; R. 44–45; Tr. 97, 70–71.) Mr. Spielman made allegations concerning various alleged illegal activities of the taxpayers and he turned over approximately 100 documents to Mr. Hawley and Mr. Chandler. (R. 44–45; Tr. 110, 1203; Pltf. Ex. 11, pp.

[4] These duties included liaison work with the NBI, through which he met and became friendly with Colonel Lukban, the Acting Director of the NBI. (Tr. 71–72.)

3–4.) Mr. Chandler first met Mr. Spielman on December 18, 1961 (Tr. 93), and he soon concluded that Mr. Spielman's information indicated possible tax liabilities to be due from the taxpayers, and on December 22, 1961, he so advised his headquarters in Washington, D.C. (Pltf. Ex. 11.) However, on December 22, 1961, Mr. Chandler also advised his headquarters that any tax investigation was beyond his office's capabilities, and he recommended that a team of agents be assigned to this matter. (Pltf. Ex. 11.)

Although Mr. Chandler continued to meet frequently with the informer for about 26 days after December 18, 1961 (Tr. 112, 126, 444–454, 466–467), he did nothing but collect information from Mr. Spielman (Tr. 112–128) and continued to ask his headquarters in Washington for help (Tr. 129–130). Indeed, on January 10, 1962 (Deft. Ex. E) and February 12, 1962 (Deft. Ex. F), Mr. Chandler repeated to his headquarters his requests for help, and even stated that it would be better not to undertake this tax investigation than to attempt it with an inadequate staff (Deft. Ex. E). As of February 13, 1962, it still had not been decided whether or not to assign personnel to conduct this tax audit (Deft. Ex. F), and in fact this audit was not assigned to anyone until after the date of the raids on March 3, 1962 (Tr. 468–469).[5]

[5] From December 18, 1961, the date on which Mr. Chandler met the informer Spielman until March 3, 1962, the date of the raids by the Philippine authorities, Mr. Chandler was not assigned nor did he assign the investigation of the taxpayers' liabilities (Tr. 468–469, 1179); rather, he was trying to keep

As to the first meetings between Mr. Chandler and Mr. Spielman, these either took place at Mr. Spielman's house or Mr. Chandler's office (Tr. 112–113, 444–454, 466–467), and, at these meetings, Spielman expressed a fear for his personal safety (Tr. 141, 472). Mr. Hawley tried for some time to have Mr. Spielman turn over his information to Colonel Lukban, of the NBI, as the information concerned violations of Philippine laws and because the Philippine authorities could give Mr. Spielman the protection he sought. (Tr. 1101–1102, 1205, 1210–1213.) Finally, Messrs. Chandler and Hawley persuaded Mr. Spielman to relate his information to Colonel Lukban, which he did on January 27, 1962, at the United States Embassy. (Tr. 465, 1203–1205, 1210–1213; R. 45.)

This was not the first interest that the Philippine law enforcement authorities had in the taxpayers however. Between Christmas of 1961 and the first week of January of 1962, Colonel Lukban contacted Mr. Chandler and advised that he was aware that Mr. Chandler had some information relative to Mr. Stonehill, and he requested it; Mr. Chandler, however, refused to divulge it because of the informant's desire for anonymity. (Tr. 463–465, 1101, 1204.) In fact, former Philippine Secretary of Justice Diokno has testified that the raids in question were made solely for the purpose of a Philippine investigation which

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the informer available and cooperative and to keep abreast of the Philippine law enforcement authorities' (NBI's) actions with respect to the informer and the taxpayers.

had begun years earlier and therefore prior to Mr. Chandler meeting the informer. (Pltf. Ex. 12, pp. 14, 38, 52, 145.)

After Mr. Spielman was introduced to Colonel Lukban of the NBI, there occurred some 10 or 12 meetings at Mr. Chandler's house (Tr. 146); some of these meetings were between officers of the NBI and Mr. Spielman, however, Philippine officials were not present at many of these meetings (Tr. 273–274). Mr. Spielman requested that the meetings take place at Mr. Chandler's house (Tr. 148) because being fearful of his life,[6] he refused to be seen entering the NBI headquarters, and Colonel Lukban felt that the United States Embassy was not appropriate (Tr. 139–141, 471–472). Mr. Chandler consented to this (Tr. 472), as he was friendly with Colonel Lukban. (Tr. 72.) With respect to these meetings, Secretary Diokno testified that Colonel Lukban was trying to keep Mr. Spielman's movements and whereabouts secret. (Pltf. Ex. 12, p. 22.) Mr. Chandler was not at all of the meetings at his house (Tr. 997–998) and those at which he was present, he described as basically being between the informer Spielman and the NBI (Tr. 149, 998).

At the beginning of February of 1962, the then Secretary of Justice for the Republic of the Philippines, Jose Diokno, became involved with the investigation of the taxpayers by the NBI (Pltf. Ex. 12, p. 15) and he met with Mr. Chandler and Mr. Hawley

[6] Mr. Spielman had already received one severe beating. (Pltf. Ex. 11, p. 3.)

to ascertain what interest the United States had in the taxpayers and their activities (Tr. 979). Shortly thereafter, Secretary Diokno requested Mr. Hawley to help arrange a meeting between himself and the then Attorney General of the United States, Robert F. Kennedy, who was making a tour of the Far East; Mr. Chandler helped Mr. Hawley in this matter by giving Secretary Diokno the name of the Hong Kong police official in charge of security for Mr. Kennedy's party in Hong Kong. (Pltf. Ex. 12, pp. 60–63.)

Secretary Diokno flew to Hong Kong and saw an aide of Attorney General Kennedy, a Mr. Seigenthaler, on February 11, 1962. (Pltf. Ex. 12, pp. 24–25; Deft. Ex. AZ.) At this meeting, Secretary Diokno requested help of the United States in investigating the taxpayers; specifically, he requested that the services of some tobacco experts be made available to him in investigating the activities of the taxpayers' Philippine tobacco companies' activities. (Pltf. Ex. 12, pp. 25–26, 61–62.) No help was requested of Secretary Diokno by the United States at this meeting (Pltf. Ex. 12, p. 25–26, 44), or by Mr. Chandler at any meeting (Pltf. Ex. 12, p. 44). Further, Secretary Diokno has admitted that the help he requested of the United States was never provided. (Pltf. Ex. 12, pp. 26, 169.) Around the time of the Hong Kong trip by Secretary Diokno, Secretary Diokno decided to have the taxpayers arrested and their companies' business premises raided in connection with the NBI's investigation. (Pltf. Ex. 12, pp. 26–31.) Mr. Chandler learned of Mr. Diokno's decision with respect to the proposed raids

and he requested that no such action be taken but that the status quo be maintained until personnel from the Internal Revenue Service were assigned to this matter on behalf of the United States and until such personnel had an opportunity to evaluate this matter. (Tr. 986.) This request however was disregarded and the raids were conducted on March 3, 1962, prior to the arrival of Special Agent Sterling Powers on March 8, 1962, who was to be in charge of this investigation for the United States. (Tr. 468–469, 1179.) After this decision by Secretary Diokno, and in advance of the raids, Mr. Chandler did endeavor to secure from Colonel Lukban permission to see records seized in the raids. (Tr. 989.)

On the night of March 2, 1962, Mr. Chandler was contacted by an aide of Colonel Lukban who requested that he see Colonel Lukban at his home. (Tr. 1006.) Upon reaching Colonel Lukban's house, he found a large number of NBI personnel there speaking the Tagalog language. (Tr. 1006–1007.) Mr. Chandler was shown a paper described to him as a warrant [7] and his comments were solicited; Mr. Chandler has testified that he had never seen any search warrants before and that he remarked that it looked all right to him. (Tr. 1007.) After so testifying at the trial herein, Mr. Chandler was shown a copy of one of the search warrants (Deft. Ex. N) and the applications for the search

[7] At this time, no search warrants had even been issued as application for the warrants were made on the morning of March 3, 1962. (Tr. 857–858.) Mr. Chandler also testified that it appeared to him that the warrants had already been prepared when he arrived at Colonel Lukban's house. (Tr. 319.)

warrants, and he testified that these were not the documents nor the type of documents that were shown to him that night. (Tr. 1007–1008, 1010–1011.) Mr. Chandler did not know what premises were going to be raided or how many search warrants were going to be issued (Tr. 1010); however, out of curiosity, Mr. Chandler inquired as to whether the NBI intended to include some premises at the Army-Navy Club, rented by a Karl Beck,[8] in the raid, as he thought any such raid should include those premises. (Tr. 1009–1010.) The basis of this question was the information furnished to Mr. Chandler and the NBI by the informer Spielman. (Tr. 318–319.) Whereupon, it appears that the Army-Navy Club premises were included in the raid. Mr. Chandler was present at Colonel Lukban's house on the night of March 2, 1962, for not more than 30 minutes (Tr. 1008), and he has emphatically denied that he dictated or gave any written instructions to any NBI personnel at Colonel Lukban's house just prior to the raid (Tr. 328–330), or that he participated in the planning of the raids (Tr. 320), or that he composed the language of any search warrants or

[8] Mr. Beck was an officer of the Industrial Business Management Corporation, a Philippine corporation of which the taxpayers were stockholders. (Tr. 665–666, 691.) Mr. Beck, in his testimony in this suit, alleged that the room in the Army-Navy Club was rented by Mr. Stonehill in his [Beck's] name to store papers of Mr. Stonehill. (Tr. 679.) However, in a suit in the Philippines, Mr. Beck filed an affidavit (Pltf. Ex. 7; Tr. 724–725), in which he stated that he [Beck] rented the room as a place of rest and personal study. (Pltf. Ex. 7; Tr. 698.) It should further be noted that these premises were seized under a warrant directed at several corporations, including Industrial Business Management Corporation (Pltf. Ex. 7, p. 2) of which Mr. Beck was an employee.

applications for search warrants (Tr. 315–316). Finally, Mr. Chandler testified that he did not answer any questions of the NBI team leaders concerning these raids at Colonel Lukban's house (Tr. 308–309), and from his observation, their presence at Colonel Lukban's house was of a social nature (Tr. 305–306), although NBI Agent Nocon was typing (Tr. 1007); and he never did get an explanation from Colonel Lukban as to his request for Mr. Chandler to come to his house (Tr. 1008). Mr. Chandler emphatically stated that the only aid he ever gave the Philippine officials at any time was to relay information from the informer Spielman to them. (Tr. 320.)

The raids on the taxpayers and the corporations in which they had an interest were commenced on Saturday, March 3, 1962, at 1:00 p.m. (Tr. 396, 909), at which time the taxpayers were arrested (Tr. 908) and 200 NBI agents (Tr. 906) simultaneously raided (Tr. 864; Pltf. Ex. 12, p. 29) the business offices of the taxpayers and 17 different corporations (R. 45). Secretary of Justice Diokno testified that he made the decision concerning this raid and that the NBI made all the preparations for this raid. (Pltf. Ex. 12, pp. 27–40, 46–49.) This testimony is corroborated by the taxpayers' witness Major Del Rosario, who was Secretary Diokno's aide. (Tr. 902.) Further, Secretary Diokno testified that he personally cleared this investigation of the taxpayers with the President of the Philippines and that he received permission to proceed from that official. (Pltf. Ex. 12, pp. 45–46, 93–94.) Secretary Diokno testified that these raids were

not conducted for any purposes of the United States Government but solely to uncover violations of Philippine law (Pltf. Ex. 12, pp. 52–53), and that he received no requests from the United States Government or Mr. Chandler with respect to the raids (Pltf. Ex. 12, pp. 43–44). Finally, Secretary Diokno stated that the raids commenced at about noon to 1:00 p.m. (Pltf. Ex. 12, p. 39; Tr. 909) and that at 5:30 p.m., he had received a report as to what the raids had turned up (Pltf. Ex. 12, p. 40); thereafter, he and Colonel Lukban visited the various raided premises, and he did nothing further on this matter after 9:00 or 10:00 p.m. (Pltf. Ex. 12, pp. 41–42).

Mr. Chandler, together with two employees from his office, Mr. Ragland[9] and Mr. Reynolds, at 1:00 p.m., on March 3, 1962, went to a parking lot across the street from the main NBI headquarters to await the conclusion of the raids and to see if they could obtain from the NBI any records which were seized. (Tr. 1012–1013, 1136.) They remained there or at the NBI arson squad building until approximately 10:00 p.m. that night without any communication with the NBI, although Mr. Chandler tried to telephone Colonel Lukban several times. (Tr. 1017–1018.) At approximately 5:00 p.m., on March 3, 1962, Messrs. Chandler, Ragland and Reynolds read in the evening

[9] Mr. Ragland was an Internal Revenue Agent who had been sent to the Philippines there to work under and assist Special Agent Sterling Powers who was to handle this tax investigation for the United States. (Tr. 1183–1184.) Mr. Ragland arrived in the Philippines on February 26, 1962 (Tr. 1133), while Mr. Powers did not arrive until March 8, 1962 (Tr. 1179).

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newspaper that the taxpayers had been arrested and that various businesses with which they had been associated had been raided. (Tr. 1015–16.) Finally, at about 10:00 p.m., Mr. Chandler talked to Colonel Lukban on the telephone and Colonel Lukban requested him to come over to his office. (Tr. 1017–1018.) Messrs. Chandler, Ragland and Reynolds went to Colonel Lukban's office and there they saw a large volume of records which, they were told, came from the raided premises. (Tr. 401, 1018–1019, 1139–1140.) They were given to understand, at that time by Colonel Lukban, that the raids had been accomplished although the NBI remained in possession of many of the raided premises. (Tr. 400–401.) Indeed, the NBI retained possession of many of the corporate premises for several years, including the premises of United States Tobacco Company. (Tr. 609–611.) Mr. Chandler, at this time, requested permission from Colonel Lukban to copy the seized documents, but this request was refused and he was told that the seized documents and records would be made available to them only after said records had been examined, catalogued, and inventoried by the NBI. (Tr. 1019, 1143, 425–426.)

Messrs. Chandler, Ragland and Reynolds were present in Colonel Lukban's office for approximately one-half hour. (Tr. 1144.) While they were there, an NBI agent entered and told Colonel Lukban that he had seized a large volume of corporate records (Tr. 1142, 1019–1020) at a warehouse of the United States Tobacco Corporation and he advised Colonel Lukban that the quantity seized was too large to bring back

to the NBI office and he requested the help of an accountant to identify what records were significant from an accounting point of view. (Tr. 1142–1143, 1019–1021.) Whereupon, Colonel Lukban asked Mr. Chandler to go to the warehouse and help the NBI agents there, and Mr. Chandler agreed. Messrs. Chandler, Reynolds and Ragland were taken to the warehouse by an NBI agent and they found there a large quantity of old corporate records in a storage area (Tr. 1019–1022, 1142–1147),[10] they pointed out an old general ledger of the corporation and some supporting books as being the more significant records from an accounting point of view and they left. (Tr. 1019–1022, 1146–1148.) They made no detailed examination of these records, they took no records with them, they do not know what the Philippine authorities did with them, and they have never seen these old records since. (Tr. 1147–1149.) Further, they were at this warehouse for only one-half hour, beginning at approximately 11:00 p.m., on March 3, 1962. (Tr. 1024, 1149.) Upon leaving the warehouse of the United States Tobacco Corporation, Mr. Chandler drove by the main

[10] This warehouse and the records therein were in the custody of the NBI when Messrs. Chandler, Ragland and Reynolds saw the records (Tr. 339, 404), and the records remained in the NBI custody for two years (Tr. 610–611). Further, when Mr. Chandler arrived at the warehouse, the records were not in sealed boxes but were in great disarray on the floor (Tr. 1022, 1146) and obviously had been examined by the NBI agents as they were originally in sealed boxes on shelves. (Tr. 657.) Even the taxpayers' own witness, Mrs. Zubiri, admits that the NBI agents broke the cartons containing these records and examined them prior to the arrival of Mr. Chandler. (Tr. 657–658.)

office of that company several blocks away. Upon passing the main office, he parked his car, and leaving Mr. Ragland and Mr. Reynolds, he approached the NBI agent in charge of the NBI team which had custody of these corporate premises. (Tr. 1150, 1024–1025.) He asked the agent if he had found the record storage room which Mr. Spielman had advised both Mr. Chandler and the NBI about; the NBI agent did not seem to know about it and he requested Mr. Chandler to point this area out. (Tr. 1025.) Mr. Chandler stepped into this business office building and pointed out generally the location of the record storage room and left. (Tr. 1025.) Mr. Chandler did not enter the storage area or examine any records there (Tr. 1025–1026); and he was on the corporate premises for approximately five minutes[11] (Tr. 1026). After Mr. Chandler left, the NBI team did enter the record storage area and they found there stock inventory records of the United States Tobacco Corporation. (Tr. 614–619.) Upon leaving the main office of this company, Messrs. Chandler, Ragland and Reynolds proceeded home. (Tr. 1034–1035.)

On Sunday, March 4, 1962, Mr. Chandler again contacted Colonel Lukban and requested that he make seized records available, and again Colonel Lukban refused saying that the seized records would be made available for copying but that Mr. Chandler would

[11] It should be noted that this visit to the warehouse and main office of the United States Tobacco Corporation occurred at least eight hours after these premises had been seized by the NBI and after Colonel Lukban advised that the raids had been accomplished.

have to wait until the NBI had gone over the records and had inventoried them. (Tr. 425–426.) On the afternoon of March 4, 1962, Mr. Chandler, Colonel Lukban, Secretary Diokno, and other NBI personnel attended a party at Mr. Hawley's house. (Tr. 426–427.) Counsel for the taxpayers have labeled this party a victory celebration over the success of the raids. (App. Br. 15.) Mr. Hawley has testified in his deposition in this proceeding that this party was arranged before he knew of the raids and was in honor of two NBI agents who had been selected to go to a Federal Bureau of Investigation School in the United States. (Hawley Dep., pp. 250–253, 266–271, 311.)

On Monday, March 5, 1962, Messrs. Ragland and Reynolds went to the NBI headquarters and some of the seized records were made available to them for the first time; but they were not given free access to all of the records seized. (Tr. 1153.) On Thursday, March 8, 1962, Special Agent Sterling Powers, who was sent from the United States to conduct any investigation, arrived in Manila. (Tr. 1179.) Mr. Powers examined the information divulged by the informer Spielman and copies of such records as had been made available by the Philippine authorities, and on March 12, 1962, he made an application to his office to have a fraud investigation of the taxpayers opened. (Tr. 1181–1184.) Two weeks later, his office in Washington, D.C., opened a fraud investigation of the taxpayers. (Tr. 1184.) Messrs. Powers and Ragland continued to inspect and copy the seized documents for a number of months thereafter. (Tr. 1183.)

The only other significant fact following the raids was the deportation of the taxpayers from the Philippines as a result of the investigation of them by the Philippine authorities. (Pltf. Ex. 12, pp. 54–55; R. 45; Tr. 1215.)

Upon analyzing these facts, the trial court found that: (1) The Philippine authorities were conducting an investigation of the taxpayers prior to the informant Spielman being referred to them by the United States agents (R. 45, 52); (2) the Philippine authorities decided upon holding the raids (R. 45–46, 52), and no United States official requested or instigated these raids (R. 52) but, rather Mr. Chandler expressed disapproval of the raids (R. 45–46, 52); (3) that no official of the United States was a party to or participated in the raids conducted by the Philippine authorities, although they knew that the raids would be conducted (R. 52–53); and (4) the raids conducted by the Philippine authorities were illegal under Philippine law (R. 52). The trial court then concluded that the illegality of the acts of the Philippine law enforcement authorities did not preclude the use by the United States of the evidence secured in those raids by the Philippine authorities and subsequently turned over to the United States. (R. 56–57.)

In this appeal, the taxpayers are contending that these findings of fact are erroneous and should be set aside; and, further, that the trial court's order should be reversed whether or not United States agents participated in the illegal raids.

SUMMARY OF ARGUMENT

Neither the Fourth Amendment nor the exclusionary rule of evidence employed as a sanction to the Fourth Amendment is applicable to the acts of foreign officials. *Brulay* v. *United States,* 383 F. 2d 345 (C.A. 9th), certiorari denied, 389 U.S. 986; *Birdsell* v. *United States,* 346 F. 2d 775 (C.A. 5th), certiorari denied, 382 U.S. 963; Cf. *Burdeau* v. *McDowell,* 256 U.S. 465; *Wentz* v. *United States,* 244 F. 2d 172 (C.A. 9th), certiorari denied, 355 U.S. 806. The Fourth Amendment could apply to raids by foreign officials or third parties only if federal agents so substantially participated in the raids so as to convert the raids into joint ventures between the United States and the foreign officials or third persons. Cf. *Byars* v. *United States,* 273 U.S. 28; *Lustig* v. *United States,* 338 U.S. 74; *Symons* v. *United States,* 178 F. 2d 615 (C.A. 9th), certiorari denied, 339 U.S. 985; *Sloane* v. *United States,* 47 F. 2d 889 (C.A. 10th).

In order to establish that there has been substantial participation by the United States, three facts must be shown: (1) The presence of a federal agent at the time and place of the raid; (2) the examination and selection by the federal agent, prior to seizure, of the evidence to be seized at the raid according to the suitability of the evidence for use in a federal prosecution; and (3) the possessing of the seized evidence by the federal agent at the time and place of the raid, and his retention of exclusive possession of the seized evidence for use in a subsequent federal prosecution.

Cf. *Byars* v. *United States, supra; Lustig* v. *United States, supra; Symons* v. *United States, supra; Sloane* v. *United States, supra; Myers* v. *United States,* 49 F. 2d 230 (C.A. 4th), certiorari denied, 283 U.S. 866; *Thompson* v. *United States,* 22 F. 2d 134 (C.A. 4th); *Shurman* v. *United States,* 219 F. 2d 282 (C.A. 5th), certiorari denied, 349 U.S. 921; *United States* v. *Evans,* 179 F. Supp. 834 (Md.); and *United States* v. *Brown,* 151 F. Supp. 441 (E.D. Va.).

The trial court's findings that no federal agents requested, instigated, or participated in the raids conducted by the Philippine authorities should not be set aside as they are not clearly erroneous but, rather, these findings are supported by clear and convincing evidence. Neither the fact that federal agents knew beforehand that Philippine authorities intended to raid premises owned by the taxpayers and certain corporations managed by the taxpayers nor the fact that federal agents, after reading of the raids in the newspapers, visited two corporate premises seized in the raids 10 hours earlier, amounts to any participation in the raids. The facts remain that the raids were the culmination of an investigation begun by the Philippine authorities well in advance of any contact between Philippine and United States officials relative to this case; no United States official was present at the time the raids were effected; and no evidence was secured from any seized premises by any United States

official for use in any federal investigation; rather, federal officials obtained evidence from Philippine officials days after the raids and after the Philippine officials had inventoried the records which were seized. Further, only those records were turned over to the United States officials which the Philippine authorities decided in their discretion to turn over. Accordingly, it is submitted that the trial court's order denying the motion to suppress should be affirmed.

It is further submitted that, if it is decided that the evidence in question should be suppressed in any United States criminal prosecution, this evidence should be admissible in this civil proceeding to impeach the statements of the taxpayers as contained in their federal tax returns and in the testimony which they are expected to offer at the trial of their tax liabilities.

Finally, it is submitted that, if it is decided this evidence is suppressible in this civil suit, this matter should be remanded to the trial court with the instructions to try the issue of the standing of the taxpayers to suppress the various items of evidence in the Government's possession, as the trial court specifically deferred this issue until after it decided the issue as to whether there was any participation by the United States in the raids conducted by the Philippine officials. (Tr. 722.)

ARGUMENT

I. The Fourth Amendment does not apply to a raid by foreign officials unless an agent of the United States so substantially participates in the raid as to convert the raid into a joint venture between the United States and the foreign officials. As used in this sense, substantial participation means: That the federal agent is present at the initiation of the raid and seizure, examines and sifts articles turned up by the search, and, in his discretion, decides on the seizure of evidence and his retention of it for use in a subsequent federal prosecution

The Court of Appeals for the Ninth Circuit in *Brulay* v. *United States,* 383 F. 2d 345, certiorari denied, 389 U.S. 986, held that the Fourth Amendment, *supra,* and the exclusionary rule of evidence employed to enforce it has no application to raids and seizures by foreign officials, stating (p. 348):

> The Fourth Amendment is directed at the Federal Government and its agencies. Fourth Amendment rights are protected from state encroachments by the Fourteenth Amendment which reaches the states and their agencies. The Fourth Amendment does not, by its language, require the exclusion of evidence and the exclusionary rule announced in Weeks is a court-created prophylaxis designed to deter federal officials from violating the Fourth Amendment. Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule there since what we do will not alter the search policies of the sovereign Nation of Mexico.

See Also: *Birdsell* v. *United States,* 346 F. 2d 775 (C.A. 5th), certiorari denied, 382 U.S. 963; Cf. *Wentz* v. *United States,* 244 F. 2d 172 (C.A. 9th), certiorari denied, 355 U.S. 806.

Prior to the decisions of the Supreme Court in *Mapp* v. *Ohio,* 367 U.S. 643, and *Elkins* v. *United States,* 364 U.S. 206, wherein the Supreme Court held that the Fourth Amendment was incorporated in the Fourteenth Amendment and therefore applicable to state agencies, it was pertinent to inquire as to whether federal officials so substantially participated in a raid by state officials so as to convert the raid into a joint venture between the state and federal officials, and therefore subject to the provisions of the Fourth Amendment. *Byars* v. *United States,* 273 U.S. 28, and *Lustig* v. *United States,* 338 U.S. 74. The essentials of that inquiry are equally pertinent in determining whether federal officials so substantially participated in a raid by foreign officials so as to convert that raid into a joint venture between the United States and the foreign government and therefore subject to the provisions and sanctions of the Fourth Amendment.

A close reading of the cases involved in this inquiry reveals that the following three elements are neces-

sary to convert a raid by a third party into a joint venture with the United States:

> (1) The presence of a federal agent at the time and place of the raid;
>
> (2) the examination and selection by the Federal agent, prior to seizure, of the evidence to be seized at the raid according to the suitability of the evidence for use in a federal prosecution; and
>
> (3) the possession of the seized evidence by the federal agent at the time and place of the raid, and his retention of exclusive possession of the seized evidence for use in a subsequent federal prosecution.

Byars v. *United States, supra; Lustig* v. *United States, supra; Sloane* v. *United States,* 47 F. 2d 889 (C.A. 10th); *Symons* v. *United States,* 178 F. 2d 615 (C.A. 9th), certiorari denied, 339 U.S. 985; *Myers* v. *United States,* 49 F. 2d 230 (C.A. 4th), certiorari denied, 283 U.S. 866; *Shurman* v. *United States,* 219 F. 2d 282, certiorari denied, 349 U.S. 951; *United States* v. *Evans,* 179 F. Supp. 834 (Md.); and *United States* v. *Brown,* 151 F. Supp. 441 (E.D. Va.).

The Supreme Court, in *Byars* v. *United States, supra,* held that a state search and seizure was the act of the United States and violative of the Fourth Amendment because of the substantial participation in the search and seizure by a federal agent. In reaching this result, the Supreme Court recognized that *mere* participation in the state search by the federal officer would not render the search an act of the

United States and involve the Fourth Amendment, stating (p. 32):

> While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods.

However, the Court held that the federal agent had gone beyond *mere* participation, stating (pp. 32–33):

> The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as a private person might have been, but was asked to participate and did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent. The house to be searched contained only four rooms—a dining room, a kitchen, and two bedrooms. We are not prepared to accept the view that the local officer thought a force of four men would be insufficient to search these limited premises; and it is significant, in that connection, that he did not ask his superior officer for additional help, but inquired particularly for Adams, who, he knew, was the federal agent. *The stamps found were not within the purview of the state search warrant, nor did they relate in any way to a violation of state law. Those found by the* [*federal*] *agent were held by him as of right and without question, those found by the state officer were considered by both the local officer in charge and the federal agent as things which*

> *concerned the federal government alone and then and there were surrendered to the exclusive possession of the federal agent*—a practical concession that he was present in his federal character. *We cannot avoid the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the local and federal officers.* In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own. [Emphasis added.]

After reviewing these facts,[12] which indicate the presence of the three essential prerequisites listed above, the Court noted (p. 33):

> Similar questions have been presented in a variety of forms to the lower federal courts, but nothing is to be gained by attempting to review

[12] In the *Byars* case, *supra*, the following salient facts should be specifically noted: (1) The federal agent accompanied the four state agents at the outset of the raid; and since only four rooms were to be searched, the help of the federal agent was not needed by the state officers for purposes of the state's case; (2) the federal agent searched some of the premises himself (kitchen); (3) the federal agent found some and selected all the evidence seized solely because it related to a possible federal offense, knowing it could not relate to any state offense and was outside the purview of the state search warrants; (4) the state agents, at the time of the raid, gave everything they found to the federal agent for his critical examination as to its possible use in some possible subsequent federal proceedings; (5) any evidence the federal agent found at the time of the raid or that the state agents gave him at the time of the raid, and which he deemed useful in a federal case, he kept in his exclusive possession and carried away from the scene of the raid, with the state authorities never seeing or possessing such evidence again.

> the decisions *since each of them rests, as the present case does, upon its own peculiar facts* * * *. [Emphasis added.]

The acts of participation must be such that the search and seizure can be said to be a joint operation or joint venture between the United States and the state or foreign government. That is, some facet of the search must be performed by the federal agent, not for the state's purposes, but for federal purposes. Whether the search does become a joint venture can be determined only by a comparison of what the federal agent did in the search and seizure with the totality of acts done in the search and seizure. In *Byars,* the Court concluded that the only reason the federal agent was present at the time of the raid was to select that evidence which was subsequently introduced in the federal prosecution. Further, the federal agent selected certain evidence according to the sole criterion of its use in a federal prosecution, and he kept exclusive possession of this evidence at all times.

Subsequently, the Supreme Court reaffirmed the *Byars* doctrine in a counterfeiting case captioned *Lustig* v. *United States,* 338 U.S. 74, stating (p. 79):

> The decisive factor in determining the applicability of the *Byars* case is the *actuality of a share by a federal official* in the total enterprise of *securing* and *selecting* evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to

> have participated in it * * *. *Evidence secured through such federal participation is inadmissible* * * *. [Emphasis added.]

In that case, the Court defined the duration of the search as follows (p. 78):

> Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects [evidence] for subsequent proof of an offense.

In holding the federal officer to have participated in the state raid so as to convert it into a joint venture between the federal and state governments, the Supreme Court summarized the facts of participation in *Lustig,* as follows (p. 78):

> *Greene's selection of the evidence deemed important for use in a federal prosecution for counterfeiting, as part of the entire transaction in Room 402, was not severable, and therefore was part of the search carried on in that room.* The uncontroverted facts show that before the search was *concluded* Greene was called in, and although he himself did not help to empty the physical containers of the seized articles he did share in the critical examination of the uncovered articles as the physical search proceeded. It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection *with the view to its use in a federal prosecution,* or the federal agent himself takes the articles out of a bag. [Emphasis added.]

Further, the Supreme Court stated (p. 79):

> Though state officers preceded Greene in illegally rummaging through the bags and bureau drawers in Room 402, they concerned themselves especially with turning up evidence of violations of the federal counterfeiting laws after Greene joined them. He was an expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded. *He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting.* [Emphasis added.]

As for the evidence actually seized in the state raid, it was apparently turned over to the federal agent by the state officer at the very scene of the search or shortly thereafter, as the Supreme Court noted (p. 77):

> After the search was completed, Greene and the city police gathered up the articles revealed by the search and carried them to the police station. Some of the articles were given to Greene before he left Room 402 [the searched premises]; all were eventually turned over to him.

Thus, in *Lustig,* the three prerequisites for substantial participation are present, as a facet of the search itself was actually by the federal agent for the sole benefit of the United States; and the federal agent actually selected the evidence seized, took possession of it at the time of the search and retained the evidence in his exclusive possession until it was subsequently used in a federal prosecution.

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In *United States* v. *Evans*, 179 F. Supp. 834 (Md.), the court analyzed the *Lustig* case as follows (pp. 841–842):

> As I read the *Lustig* case the decisive factor was whether *Greene* [*the federal agent*] *had actively and effectively participated in making the search for the incriminating counterfeiting evidence which he was best qualified to do as an expert;* and the holding in the case was that on the facts stated he had so participated while the search was in progress and before it had been concluded. As the decision turned on the judicial view of the evidence itself, it was, as the opinion notes, stated with "particularity", and I think in this connection it is appropriate as emphasis of that point to note that on the same evidence there was a strong minority view. Of course this does not in any way minimize the weight of the majority opinion but I think it does emphasize the necessary particularity of the evidence in the case, and requires a careful critical comparison of the facts in the instant case with those in the *Lustig* case. I have therefore above endeavored to state the facts in the instant case with the same degree of particularity for comparison with those in the *Lustig* case. [Emphasis added.]

After so analyzing the *Lustig* case, the court in the *Evans* case held there was no participation by the federal agent in the illegal state search and seizure even though the federal agent took possession of the evidence at the scene of the raid, stating (p. 842):

> With this comparison in mind, the decisive factor in the instant case is *that the search by the state police had been completed before*

> *Mueller* [*the federal agent*] *arrived on the scene* [*of the search*] *and took any action in the matter.* [Emphasis added.]

This Court in *Symons* v. *United States,* 178 F. 2d 615, certiorari denied, 339 U.S. 985, held that evidence obtained in a state raid could be used in a federal prosecution even though federal officers took possession of some of the evidence at the scene of the raid. The Court held that there was no violation of the Fourth Amendment under the rationale of the *Byars* and *Lustig* cases, *supra,* as the evidence, consisting of marijuana, had been effectively seized by state officials in a state search, albeit the evidence was then turned over to federal officials at the very scene of the search. The decisive factor was that no federal official was present and helped to sift and select evidence with a view towards a federal prosecution while the seizure of evidence was taking place.

The United States District Court for the Eastern District of Virginia, in *United States* v. *Brown,* 151 F. Supp. 441, discussed the Supreme Court's rationale of participation as set forth in *Byars, supra,* and held that a federal agent did not participate in an illegal state search and seizure merely because he was present at the scene and at the time of the state search. In the *Brown* case, the District Court cited *Myers* v. *United States,* 49 F. 2d 230 (C.A. 4th), certiorari denied, 283 U.S. 866, and *Thompson* v. *United States,* 22 F. 2d 134 (C.A. 4th), and language used in those appellate court cases to the effect that the mere presence of a federal agent at an illegal state search and seizure did not render him a participant in the search

and seizure so as to preclude the admissibility of the evidence seized, but that the real inquiry was whether, under the facts, the search was in truth a proceeding by the state.

It should also be noted that the acts of a federal agent in advising state or foreign officials as to violations of their law, or giving them other information or advice with respect to a prospective state or foreign raid, is not tantamount to participation by the federal government in that raid. In *Sloane* v. *United States,* 47 F. 2d 889, the Tenth Circuit held that a federal agent did not so substantially participate in a state search and seizure so as to convert the seizure into one by the United States, even though the federal agent gave the state officials the information which led to the search and seizure and secured aid for the state official making the search and seizure. In so holding, the court stated (P. 890):

> While the instant case comes very close to the line, we are not convinced that such a purpose actuated Whiteneck [the federal agent] when he gave the information to Eads [the state official]. By passing on the information, he may have provoked the action of the state officers, but he neither ordered nor directed the search. Eads did not act under the order or direction of Whiteneck, but on his own initiative. The state officers were not acting for the federal officers nor solely for the purpose of aiding in the enforcement of the federal law. They were performing their normal duties as state officers.

The Fifth Circuit in *Shurman* v. *United States,* 219 F. 2d 282, certiorari denied, 349 U.S. 921, held that

a state search and seizure made solely on the basis of information furnished the state by a federal official was not a search and seizure by the federal government, even though the evidence seized was subsequently turned over to the federal government and used in a federal prosecution. In reaching this result, the court commented on the *Sloane* case as follows (p. 288):

> The reasoning of the *Sloane* case seems correct. We cannot denounce such exchange of information between law enforcement agencies where no attempt is otherwise shown to do indirectly what is prohibited to do directly. Furthermore, it should be noted that the basis of our holding herein that what was done by the state officer was improper, is not that there was not probable cause for the search, but merely a failure to obtain a search warrant when it might well have been obtained, or to make a search of the car at the time of the arrest. It would be strange indeed to say that the federal agent meant to induce an illegal search, when it appears that the search could very easily have been made lawfully by the state officer. At any rate, the mere giving of information we do not regard as requesting any action whatsoever, in the absence of an understanding, voiced or tacit, to that effect; much less do we consider it an instigation of an unlawful search.

Thus, it is submitted that for a raid by a foreign government to be converted into a joint venture with the United States, each of the three elements or acts of participation listed at the outset of this argument

must be present.[13] All of these three elements were present in the *Byars* and *Lustig* cases, *supra.* As seen from the *Evans* case, *supra,* the *Symons* case, *supra,* and the *Brown* case, *supra,* the presence of a federal agent at the raid by and of itself is not sufficient participation; however, this element is necessary if the second and most important element is to be present. The third element, receipt of evidence at the scene of the raid, standing by itself or in conjunction with the first element, is also apparently insufficient to convert the foreign government's raid into a joint venture under the rationale of the decision by the Ninth Circuit in *Symons* v. *United States, supra.* Moreover, the presence of the first two elements standing alone would apparently be meaningless, as the Supreme Court pointed out in *Lustig, supra,* that it is only the evidence secured by the federal agent through his participation in the involved raid which is inadmissible under the Fourth Amendment; to this effect, the Court stated (p. 79): "Evidence secured through such federal participation is inadmissible. * * *."

Accordingly, the issue as to whether the federal government participated in the instant raids by the Philippine Government must be determined by whether

[13] (1) The presence of a federal agent at the time and place of the raid; (2) the examination and selection by the federal agent, prior to seizure, of the evidence seized in the raid according to its suitability for use in a federal prosecution; and (3) the possessing of the seized evidence by the federal agent at the time and place of the raid and his retention of exclusive possession thereafter of the seized evidence for use in a subsequent federal prosecution.

all three of the above types of acts were committed by a federal agent with respect to these raids.

II. The following findings by the trial court should not be set aside as clearly erroneous as they are supported by clear and convincing evidence; (A) the raids were conducted by the Philippine authorities as a result of their investigation which began prior to any contact with federal tax officials; (B) that no United States official requested or instigated the raids by the Philippine officials; and (C) that no United States official participated in the raids by the Philippine authorities

(1) Evidence supporting findings

Jose Diokno, who was the Secretary of Justice of the Philippines at the time of the raids, specifically testified that the Philippine Government had the taxpayers under investigation long prior to Mr. Chandler introducing the informer Spielman to the Philippine authorities; that the raids were the culmination of this investigation; and that the United States Government did not request and had nothing to do with these raids. (Pltf. Ex. 12, pp. 14, 38, 44, 52–53, 129, 145.) This is corroborated by the fact that Colonel Lukban of the NBI, prior to being introduced to the informer Spielman, approached Mr. Chandler between Christmas of 1961 and January 7, 1962, and asked him to divulge certain information relative to the taxpayers which he (Colonel Lukban) knew Mr. Chandler to possess. (Tr. 463–465.) Accordingly, it must be concluded that the Philippine authorities had the taxpayers under investigation prior to Mr. Chandler and

Mr. Hawley introducing the informer Spielman to them.[14]

Secretary Diokno also testified he himself authorized these raids (Pltf. Ex. 12, pp. 27–31, 47–48), after consulting with the President of the Philippines (Pltf. Ex. 12, pp. 45–46). This is verified by the testimony of taxpayers' own witness, Major Del Rosario, who said that Secretary Diokno made all the decisions concerning the raids and that Colonel Lukban and the NBI carried out the details of the raids. (Tr. 834, 902.) Major Del Rosario also said this investigation concerned violations of Philippine laws. (Tr. 848, 901.)[15] Secretary Diokno stated that he did not receive any request from Mr. Chandler to authorize raids (Pltf. Ex. 12, pp. 19, 43–44), nor did he receive any such request from Mr. Seigenthaler, who was the aide, of Attorney General Kennedy whom Secretary Diokno met in Hong Kong[16] (Pltf. Ex. 12, p. 44). Mr. Chandler has also specifically denied ever requesting Colonel Lukban of the NBI, Secretary Diokno, or any

[14] In fact, the culmination of this investigation was not the raids but deportation proceedings brought against the taxpayers (Tr. 852–853), wherein evidence seized in the raids was used (Pltf. Ex. 12, p. 54), and which resulted in the taxpayer's deportation from the Philippines (Tr. 1215, R. 45).

[15] Although the testimony of taxpayers' witness, Major Del Rosario, has not been cited in their opening brief, it is anticipated that appellants may refer to his testimony in their reply brief. Accordingly, that witness' testimony is analyzed in the Appendix, *infra*.

[16] In fact, at this meeting, Secretary Diokno requested Mr. Seigenthaler to help in the form of the services of some tobacco experts (Pltf. Ex. 12, pp. 25–26, 61–62), which help was never received (Pltf. Ex. 12, pp. 26, 169).

other Philippine official, to authorize or conduct the raids. (Tr. 470, 979, 989.) Accordingly, it must be concluded that the finding of fact, to the effect that the raids were not requested or instigated by any United States authorities is supported by clear and convincing evidence.

With respect to the finding that no federal official participated in the raids conducted by the Philippine authorities, it is very important to note that the raids began at 1:00 p.m. on the afternoon of March 3, 1962 (Tr. 396, 909), they were simultaneous (Tr. 864), they involved 200 NBI officials (Tr. 906), and they were directed at 32 different premises (App. Br. 3),[17] owned either by the taxpayers or by corporations controlled by the taxpayers (R. 45). After the raids were underway, Secretary Diokno testified that he went to the NBI headquarters to await a report on the results of the raids and that he remained there until 5:30 p.m., on March 3d (Pltf. Ex. 12, pp. 38–40); he further testified that at 5:30 p.m., he went to the Columbia Club for some coffee and that within 15 minutes (between 5:45 p.m. and 6:00 p.m.), he received a report from an NBI agent as to the results of the raids (Pltf. Ex. 12, p. 40). Thereupon, Secretary Diokno, together with Colonel Lukban of the NBI, visited the various raided premises (Pltf. Ex. 12, pp. 41–42); and he did nothing further on this matter after 9:00 or 10:00 p.m. (Pltf. Ex. 12, pp. 41–42).

At no time prior to 10:00 p.m., on March 3d, had Robert Chandler or his aides seen any NBI officials,

[17] "App. Br." references are to to the Appellants Brief.

although he tried to several times. (Tr. 1017–1018.) From 1:00 p.m. in the afternoon until 10:00 p.m. on March 3d, Robert Chandler stayed in the vicinity of the NBI headquarters, because Colonel Lukban said (Tr. 378)[18] * * * if we waited over there, eventually he would make records available to us." At 5:00 p.m., on the afternoon of March 3d, Mr. Chandler read of the raids in the Manila newspapers. (Tr. 1015–1016.) Finally, after 10:00 p.m., Mr. Chandler went to Colonel Lukban's office. (Tr. 1017–1018.) In Colonel Lukban's office, Mr. Chandler and Mr. Ragland saw a large quantity of records and were given to understand that the raids were over (Tr. 400–401, 1019) and that all of the raided premises and records were

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[18] Mr. Chandler's testimony as to securing the cooperation of Colonel Lukban is as follows (Tr. 989):

Q. Between those dates did you ask any Philippine official if you could have any records which they may secure from the raids?

A. Well, yes, after I found out that the Secretary [Diokno] had decided to go ahead with the raids, I did go to Colonel Lukban and ask him if we could take a look at what he might obtain during the raids.

Elsewhere, Mr. Chandler testified (Tr. 1005):

Q. You already had an agreement with Colonel Lukban that he would give you records?

A. Colonel Lukban had indicated that he would make the things available to us.

And further, Mr. Chandler testified (Tr. 271):

Q. Mr. Chandler, weren't you given, or told, the position you should take during the raid, where you should be physically located?

A. Yes. But that was in response to our request that we be given an opportunity to have access to what was obtained in the raids after they had obtained it.

The Court: Who did you make that request to?

The Witness: Colonel Lukban.

in NBI custody. Mr. Chandler asked at this time if he could copy the seized records and Colonel Lukban refused, saying that the records had to be inventoried and catalogued.[19] (Tr. 1019, 1143, 425–426.) At this time Mr. Chandler has done nothing with respect to the raids, although they have occurred 9 hours previously at 1:00 p.m. It therefore must be concluded that he did not participate in the making and execution of the raids.[20]

Likewise the evidence is clear that Mr. Chandler did not participate in the planning for the raids. Mr. Chandler admits that the informer Spielman met NBI

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[19] The following day, Sunday, March 4th, Colonel Lukban again refused Mr. Chandler's request to copy records, saying that the records still had to be inventoried. (Tr. 425–426.)

[20] The taxpayers claim that Mr. Chandler did participate in the actual raids in that he left Colonel Lukban's office after the 10:00 p.m. meeting and went to the main office and a warehouse of the United States Tobacco Corporation and examined some corporate records. (App. Br. 68–74.) This contention and the evidence relative thereto is examined in detail at pages 64 and 67 of this brief, wherein the findings proposed by the taxpayers are examined and the inconsistencies alleged by the taxpayers to exist in the trial court's findings are analyzed. Suffice it to say here, that the raids and seizure of records had been accomplished prior to Mr. Chandler proceeding to the premises of the United States Tobacco Corporation at 11:00 p.m., at Colonel Lukban's request, for the sole purpose of helping the NBI agent with respect to some corporate records in the custody of the NBI by virtue of a seizure effected hours earlier. (Tr. 1019–1022, 1140–1148.) Further, approximately 10 hours had elapsed from the outset of the raids at 1:00 p.m. and Mr. Chandler's acts at 11:00 p.m., and Secretary Diokno had already obtained a report on the raids at approximately 5:30 p.m., and had visited various of the raided premises. (Pltf. Ex. 12, pp. 40–42.)

officials at his house (Tr. 146, 273–274) but he testified that this was because Spielman, being fearful for his life, refused to be seen entering any NBI office, and the NBI deeming the United States Embassy to be an inappropriate meeting place, Mr. Spielman requested Mr. Chandler to allow him [Spielman] to meet the NBI officials in Mr. Chandler's house (Tr. 139–141, 148, 471–472). Colonel Lukban of the NBI desired to keep Mr. Spielman's movements and whereabouts secret (Pltf. Ex. 12, p. 22), so he agreed to Mr. Spielman's request (Tr. 148) and Mr. Chandler agreed (Tr. 472) because of his friendship with Colonel Lukban (Tr. 71–72). Mr. Chandler testified that he was not even present at all of these meetings at his house. (Tr. 997–998.) Further, he testified that these meetings were basically between the NBI officials and Mr. Spielman (Tr. 149, 998) and that his only function at these meetings was to explain Mr. Spielman's statements to the NBI (Tr. 366, 320).[21] With respect to Mr. Chandler's 30-minute visit to Colonel Lukban's house on March 2nd, the day before the raids (Tr. 1005–1008), Mr. Chandler emphatically denied that he wrote or dictated any instructions to NBI officials regarding the raids (Tr. 328–330), or that he participated in any planning of the raids there (Tr. 320). He testified that, other than the premises known as the Army-Navy Club premises, he did not know how

[21] Both Mr. Spielman and the NBI officials spoke English but with different accents and often misunderstood one another. (Tr. 460, 373.)

many or which premises the NBI were planning to raid. (Tr. 1010.)

The foregoing evidence clearly shows that the United States official participated in the Philippine raids within the meaning of that term, as defined by *Byars* v. *United States, supra; Lustig* v. *United States, supra,* and the other cases cited in Argument I of this brief. Accordingly, it must be concluded that the trial court's finding of "no participation by United States officials in these raids" is not clearly erroneous but is supported by substantial evidence.

(2) There are no inconsistencies between the court's ultimate and intermediate findings of fact

The appellants claim that the trial court's ultimate finding of fact is in conflict with nine of the trial court's intermediate findings of fact. (App. Br. 44–46.) The first allegedly conflicting intermediate finding of fact alleged is that some meetings were held in Robert Chandler's house to determine the *modus operandi* of the raids. (App. Br. 45.) These meetings are styled by taxpayers' counsel as meetings between United States and Philippine officials. Actually, these were meetings between NBI officials and the informer Spielman. (Tr. 121, 149, 998.) These meetings occurred in Mr. Chandler's house because Mr. Spielman, being fearful for his life, refused to be seen entering the NBI premises (Tr. 139–141, 472), and requested the meetings with the NBI officials [21a] to be held in Mr.

[21a] Colonel Lukban agreed to this request because he wished to keep Mr. Spielman's movements secret. (Pltf. Ex. 12, p. 22.)

Chandler's house (Tr. 148, 472).[22] Mr. Chandler acqui-

[22] With respect to the reasons why Mr. Chandler's was chosen as the place for the meetings, Mr. Chandler testified as follows (Tr. 471, line 20, through 472, line 11.):

Q. All right. What arrangements were made? Who said anything with regards to future arrangements to meet at your house?
A. Well, they came to the point where they [NBI] did want to talk to Spielman, to get his story down more fully, and they discussed where they would meet.
Q. You say "they"; who is "they"?
A. Colonel Lukban and Danny. I think it was all Colonel Lukban talking at that time. Then, of course, this informer was very much in fear of his life, and he would not go to a Philippine Government office, and they didn't seem to think it would be appropriate to come to the embassy. So Mr. Spielman suggested or asked if [it] would be possible for them to meet at my house. And Colonel Lubkan indicated it would be agreeable to him and I acquiesced to it. I don't remember that the particular date was set at that time.

Thus, it can be seen that it was Mr. Spielman who asked that the meetings be held at Mr. Chandler's house and he did so out of fear for his life. Mr. Chandler, at page 149 of the trial transcript, admits that, at some of these meetings at his home between the NBI and Mr. Spielman, there were discussions as to possible locations of the raids, but he also stated that he was not directly concerned with these discussions as "the discussions of this type were primarily between Spielman and the NBI people." (Tr. 149, lines 16–17). Again at page 990 of the trial transcript, Mr. Chandler testified with respect to these meetings as follows (Tr. 990, lines 22 through 991, line 15):

Q. All right, what was the topic of these discussions?
A. Well, initially they interviewed Spielman and let him tell his story. Then they questioned him about it based upon information they had. What was your question exactly?
Q. What was the topic of these discussions?
A. Oh, the topic. Well, the topic was Spielman's story on the Stonehill operations.
Q. Were raids ever discussed?
A. Well, there came a time, yes, that they began talking with him, asking him about locations, and what they might find at different places.
Q. Did you take part in any of these discussions?

esced in this both because he was on friendly terms with Colonel Lukban of the NBI (Tr. 72) and because he wished to keep the informer cooperative and available in the event that federal tax agents were assigned to investigate this matter. It should be further noted that prior to any contact with the NBI, the informer Spielman met with Mr. Hawley and Mr. Chandler at Mr. Chandler's office or Mr. Spielman's home. (Tr. 112–113.) Further, it should be noted that Mr. Chandler was not even at all the meetings at his house between the informer and NBI officials (Tr. 997–998), and that when he was present, he took no active interest in their conversations leaving the informer and the NBI personnel generally alone (Tr. 998). There is not one shred of evidence to show that Mr. Chandler ever did any planning of any raids at his home.

The second and sixth so-called inconsistent intermediate findings of fact are the suggestion of Robert

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A. Well, when they got to this type of thing, Spielman was telling them what to do and sometimes I acted as mediator.

Q. Between whom?

A. Between Spielman and the NBI agent.

With respect to his role as mediator, Mr. Chandler testified that quite a lot of friction developed between the NBI and Spielman (Tr. 1057), and Spielman had difficulty explaining things to the NBI (Tr. 366, 373). Further, Mr. Chandler testified that Mr. Spielman was a pestering (Tr. 356), domineering (Tr. 458), very bitter (Tr. 459) man who had difficulty communicating with the Philippine officials, as they very often misunderstood him because of his accent which was very different from the Philippine accent (Tr. 460, 373). Spielman was born and lived in Czechoslovakia until World War II, when he served in the United States Army and was naturalized (Pltf. Ex. 11, p. 1), whereas the Philippines spoke Tagalog among themselves (Tr. 1006–1007).

Chandler that the premises of the Army-Navy Club be included in any list of premises to be raided, and his comment as to a warrant looking all right. (App. Br. 45–46.) These acts of Mr. Chandler occurred at a meeting at Colonel Lukban's house on the evening before the raid. (Tr. 1007, 1009.) On the night of March 2, 1962, Mr. Chandler was at home with Mr. Spielman when he received a visit from a Mr. Nocon, an aide to Colonel Lukban; after Mr. Spielman left Mr. Chandler's house, Mr. Nocon said that Colonel Lukban wished to see Mr. Chandler. (Tr. 1005–1006.) Mr. Chandler thereupon went to Colonel Lukban's house, arriving about midnight, and found there a large group of NBI agents speaking the Tagalog language. (Tr. 1005–1007.) When he arrived there, the NBI agents were standing around drinking soft drinks (Tr. 1007), and the gathering appeared social in nature (Tr. 305–306). At this time, Mr. Nocon started (or resumed) typing (Tr. 1007) and Colonel Lukban showed or read to Mr. Chandler a document which was described to him as a warrant and solicited his comments. (Tr. 306, 1007.) Mr. Chandler testified that he did not know anything about warrants, never having seen any before, and he quickly replied that it looked all right to him. (Tr. 1007, 306–313.) Mr. Chandler did not even know what kind of warrant it was. (Tr. 306–308.)[23] Mr. Chandler stated

[23] At the trial, Mr Chandler was shown one of the search warrants and the application therefor which were used in the raids, but he stated that this was not the type of thing shown to him at Colonel Lukban's on March 2d. (Tr. 1007–1008, 1010–1011.)

that he did not compose or draft the warrants or the applications for the warrants. (Tr. 316.) Also, Mr. Chandler stated that he did not know how many warrants there were or how many or what premises were going to be raided. (Tr. 1010.) Further, Mr. Chandler testified that, although he overheard some of the NBI personnel make references to the forthcoming raids, he did not answer any questions of the NBI team leaders concerning the raids (Tr. 308–309), and that he neither gave advice nor made any requests to Colonel Lukban concerning the raids (Tr. 1009.) However, Mr. Chandler stated that, out of curiosity, he asked Mr. Nocon if the room rented by Karl Beck [24] at the Army-Navy Club was included in the places to be raided; when Mr. Nocon said "No", Mr. Chandler said he thought any raids should include those premises. (Tr. 1009–1010, 317–318.) Mr. Chandler stated that the reason he made this comment was because of what the informer Spielman had told the NBI and himself. (Tr. 319.) This was not an order or directive or even addressed to Secretary Diokno or Colonel Lukban, the men who decided on the raids and who planned the raids, respectively. (Pltf. Ex. 12, p. 52; Tr. 902.) The visit of Mr. Chandler to Colonel Lukban took but 30 minutes, after which Mr. Chandler went home. (Tr. 1008–1009.) Finally, it should be noted that Mr. Chandler testified that he never was given any explanation as to why Colonel Lukban had requested that he come to his house. (Tr. 1008.)

[24] See footnote 8, *supra*.

Mr. Chandler's comment on the document identified only as a warrant can only be taken for what it was, a passing comment on something about which Mr. Chandler had no knowledge. He was not an expert on warrants nor did he hold himself out to be one; he had never seen a warrant before. (Tr. 1007.) Mr. Chandler specifically testified that he did not compose or draft these warrants (Tr. 316) and he testified that they must have been typed even before he arrived at Colonel Lukban's (Tr. 319). Accordingly, this casual remark cannot be deemed to be any meaningful participation in the raids or in the preparation for the raids; and therefore this fact noted by the trial court cannot be deemed to be inconsistent with the trial court's ultimate finding of no participation.

Likewise, Mr. Chandler's remark to Mr. Nocon that he thought that the Army-Navy premises should be included in any raid was but a reminder to a lower echelon NBI employee of what the informer Spielman had already told them. This remark did not even involve premises in the names of the taxpayers but rather was about a room rented in the Army-Navy Club under the name of Karl Beck (Tr. 695), an executive of the Industrial Business Management Corporation (Tr. 666), which was one of the Philippine corporations being investigated by the Philippine authorities for violations of Philippine law (Deft. Ex. AW). There is nothing to show that this reminder by Mr. Chandler had any specific connection to any United States investigation. On its face, it was germane only to the Philippine investigation and Mr.

Chandler took no steps beyond reminding Mr. Nocon of what the informer had said. Accordingly, this fact cannot be deemed to be inconsistent with the trial court's ultimate finding of no participation.

The third, fourth and fifth allegedly conflicting intermediate findings of fact concern Defendants' Exhibits I and J, which pertain to the Philippine corporations known as the United States Tobacco Corporation and the Evening News.[25] Defendant's Exhibit J is a diagram listed as the premises of the Goodrich [26] Building, containing offices of the Evening News. Defendants' Exhibit I is described as a memorandum but actually it consists of a collection of notes arranged in numerical order, many of which are simply "no comment". The third, fourth and fifth intermediate findings which are described as conflicting with the trial court's ultimate finding of "no participation" are that Defendants' Exhibits I and J and are in the handwriting of Robert Chandler and that these exhibits came into the possession of the NBI at some time or other. (App. Br. 45.) Taxpayers argue that these two exhibits are instructions by Mr. Chandler to the NBI as to how to conduct the raids. Mr. Chandler freely admitted that most of the handwriting on these two exhibits was his (Tr. 349, 360-361), but that some of the handwriting on Defendants' Exhibit J appeared to be that of others and that

[25] These two companies are Philippine corporations in which the taxpayers had an interest. (R. 45.)

[26] There are two different buildings with similar names—the Goodrich Building and the Goodyear Building. (Tr. 348.)

the diagram part was not his because he had never been to the buildings drawn thereon. (Tr. 360–363, 368–369, 1047.) He stated that he did not remember drafting these specific exhibits (Tr. 351, 363, 367, 370, 373, 1048) but that he did make such notes and drawings when interviewing the informer Spielman and he drafted such things at Spielman's request for the purpose of reducing Spielman's story to paper (Tr. 331, 351, 353, 356–357, 366, 368, 373, 1048–1049).[27] Mr. Chandler stated that the language in these two exhibits was Spielman's language (Tr. 353, 356, 358), and that all the information on these exhibits came from the informer Spielman and that he never had been to or made any personal investigation of the described premises himself. (Tr. 372–373, 1047.) Further, Mr. Chandler explained that he did not give these or like papers to anyone other than the informer Spielman (Tr. 351, 356–357, 358, 359, 1048–1049) and that he did not remember giving the exhibits to Colonel Lukban, the NBI, or Secretary Diokno (Tr. 352, 357, 1048–1049). Mr. Chandler further emphatically denied that he wrote anything at all when he visited Colonel Lukban's house the night before the raids. (Tr. 328–330, 1041, 1077.) There is absolutely no evidence in the record that these two exhibits were ever in the possession of the NBI other than the hearsay suggestion made by counsel for the appellants in his examination. (Tr. 349–357.)

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[27] Also, he stated he helped Spielman reduce his story to paper because Spielman was often misunderstood by the NBI officials (Tr. 366, 1049), and there was a lack of rapport between Spielman and the NBI (Tr. 1048, 1049).

By no stretch of the imagination can these two exhibits be characterized as instructions or directions by Mr. Chandler to the NBI or to anyone else. The only logical explanation for Defendants' Exhibit I is that it contains responses to answers from a person being interviewed. This is clearly shown by the fact that this exhibit contains 20 numbered comments apparently tied into some picture folder. Of these 20 numbered comments, 8 of them (to-wit, 1, 3, 5, 6, 17, 18, 19 and 20) contain the notation "no comment"; and comments numbered 11, 12 and 13 merely state "Goodrich Bldg." These would be strange instructions to give any NBI personnel making raids. Also, the only items mentioned in these two exhibits which could be deemed to refer to evidence to be seized, are items consisting of—stamps, i.e., Philippine revenue stamps to be placed on cigarette packages made and sold by United States Tobacco Corporation; and rolls of cigarette paper described as newsprint which also pertain to the manufacture of cigarettes. (Deft. Exs. I, J.) These latter notations do not pertain to any evidence germane to any United States investigation, but are only pertinent to the NBI investigation which concerned counterfeit Philippine tobacco stamps, tobacco paper smuggled into the Philippines, and cigarettes on which the Philippine excise tax was not paid. (Pltf. Ex. 12, pp. 61–62; Deft. Ex. AZ.) Therefore, the taxpayers' contention that the existence of these two papers indicates some participation in the raids by the United States authorities and that these exhibits are inconsistent with the trial court's finding of no participation must be rejected as unfounded.

The seventh intermediate finding of fact cited by appellants is that the Philippine officials promised Mr. Chandler prior to the raids, that they would make available seized records. (App. Br. 46.) In this regard, Mr. Chandler testified (Tr. 989 lines 22–25):

> A. Well, yes, after I found out that the Secretary [Diokno] had decided to go ahead with the raids, I did go to Colonel Lukban and ask him if we could take a look at what *he might obtain during the raids.* [Emphasis added.]

Further, Mr. Chandler testified (Tr. 1005, lines 15–16):

> A. Colonel Lukban had indicated that he would make the things available.

Also, before any request was made of Colonel Lukban, Mr. Chandler attempted to dissuade Secretary Diokno from having any raids. (Tr. 985–986.)[23] Only after

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[23] Mr. Chandler testified as follows (Tr. 985, line 16 through 986, line 17):

Q. Prior to this visit to Hong Kong did you have any knowledge of any raids or impending raids by the Philippine authorities?

A. Well, Secretary Diokno had spoken of them before the visit to Hong Kong. He had been sort of talking out loud at the time.

Q. When was that, when and where did he talk about it?

A. It may have been that evening that he was at the house. I wouldn't remember exactly where it was. I do remember that I——

Q. Did you say anything at that time to him?

A. Yes. I didn't like the idea of the raids, and I tried to dissuade him from it.

Q. Did you try to dissuade him from ever conducting a raid, or from——

A. No. I didn't know—I had no experience with a raid, but it gave me a bad reaction. I tried to dissuade him at least from rushing into it.

Q. Can you recall what you told him?

Secretary Diokno had decided upon having raids did Mr. Chandler address any request to Colonel Lukban about seeing anything obtained in the raids.[24] Further, this was not a request for Colonel Lukban to seize anything for Mr. Chandler but rather for Colonel Lukban to allow Mr. Chandler to see what the NBI had seized for the Philippine investigation in the raids. It should also be noted that Colonel Lukban did not agree or promise to do anything, but, rather indicated that he would permit Mr. Chandler to see what was seized in the raids. Also, it should be noted that Mr. Chandler did not even tell Colonel Lukban what type of records the United States was interested in until 10:00 p.m. on March 3d in Colonel Lukban's office, after the raids had been carried out and the records seized. (Tr. 321–327.)[25] Accordingly, this request of

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A. Well, I was concerned, of course, about our case, the Internal Revenue possibilities, and I wanted particularly a Special Agent out there to know what effect all this would have on our case. So I think I probably put it on the basis of: At least wait until we know what happens to our case if you go ahead with this.

[24] Secretary Diokno did not even know that Colonel Lukban was cooperating with Mr. Chandler. (Pltf. Ex. 12, p. 158.)

[25] At the trial of this matter, Mr. Rand, counsel for the taxpayers read into the record some of the testimony from a deposition of Mr. Chandler taken in this case, and part of this reads as follows (page 325, line 7 to page 327, line 8):

The Court. What date was this?
Mr. Rand. This was after the raids, your Honor.
The Court. This is after the raids.
Mr. Rand. Well, I believe it is the day after the raids, yes.
The Court. Do you agree that this is after the raids?
Mr. McCarthy. I agree that this is after the raids. It is the night after the raids, actually, around 10:00 o'clock I believe the testimony is.
The Court. After the raids?
Mr. McCarthy. After the raids.

Mr. Chandler to Colonel Lukban does not constitute any participation in the raids conducted by the Philippine authorities.

The eighth intermediate finding cited by the appellants as being inconsistent with the trail court's ultimate finding is that Mr. Chandler and his two aids waited near the NBI headquarters on the day of the raid until the evening of the raid when they saw Colonel Lukban at his office and saw some of the seized records. (App. Br. 46.) Mr. Chandler did wait near the NBI main headquarters on March 3, 1962, the day

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The COURT. Then we will agree. Go ahead.

Mr. RAND. (Reading)

"Q Who was there?

"A I don't remember outside of Joe.

"Q No Department of Justice officials or representatives there?

"A No, not that I remember.

"Q What did you say to Lukban and what did Lukban say to you?

"A Joe was feeling very jubilant.

"Q What did he say?

"A Something about 'We hit the jackpot. We really made it go,' or something like that. He was very excited, very jubilant. Of course I didn't know any of the details of what had happened at that time.

"Q What did you say to him?

"A 'Glad it went well,' and this type of thing.

"Q Did you ask him what he got?

"A Yes.

"Q Did you ask him whether he got anything that you would be interested in?

"A I think along about that time he showed me a couple of things out of the boxes in his office, and they were the type of things that we would be interested in.

"Q Did you make a request to see the documents that you wanted to see?

"A Yes.

"Q Did you tell him what you were looking for or did he know ahead of time what you were looking for?

"A No. I think it was probably about then we told him the type of thing we would be primarily interested in."

Mr. RAND. That was the night of the raids, your Honor.

of the raids (Tr. 1013–1018), but he did not talk to any NBI personnel until 10:00 p.m. that night when he talked to Colonel Lukban on the telephone (Tr. 1017–1018)[26] even though he had read of the raids in the newspapers earlier at 5:00 p.m. (Tr. 1015–1016). After talking to Colonel Lukban on the telephone, Mr. Chandler and his two aides went to Colonel Lukban's office where they saw Colonel Lukban who gave them to understand that he [Colonel Lukban] had hit the "jackpot" and that the raids were over. (Tr. 401.) In Colonel Lukban's office, they cursorily saw a large volume of records which Colonel Lukban said had been seized. (Tr. 1018–1019.) Mr. Chandler asked for permission to see and copy the seized records but Colonel Lukban refused saying that the records had to first be inventoried and catalogued by the NBI. (Tr. 1019, 1143, 425–426.) This episode is not an instance of participation by Mr. Chandler in any raids by the Philippine authorities, but to the contrary shows that Mr. Chandler stayed aloof from the NBI during the raids[27] and did nothing with respect to the seized records until the raids were over.

The ninth intermediate finding cited by appellants as being inconsistent with the ultimate finding of no participation in the raids is that the day following

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[26] This is nine hours after the raids began at 1:00 p.m. (Tr. 396, 909.)

[27] During the day of the raids, at 1:00 p.m., Mr. Chandler deliberately refrained from going to one of the temporary buildings (arson squad building) used by the NBI, because he saw a large meeting of NBI personnel taking place there. (Tr. 1012.)

the raids arrangements were made to allow Mr. Chandler to copy the seized documents. (App. Br. 46.) On Sunday, March 4, 1962, Mr. Chandler saw Colonel Lukban and, for the second time since the raids, requested permission to copy the seized documents; Colonel Lukban refused to permit the records to be copied on March 4th as they had not been inventoried, but arrangements were made then for Mr. Chandler to come back to the NBI premises on March 5th, two days after the raids, and some of the seized records would be made available. (Tr. 426, 1036–1037.) Again, there is no participation by Mr. Chandler in any raid. Rather, this shows the lack of authority, association and influence which Mr. Chandler had with respect to the raids and to the things seized therein.

In view of the foregoing, it is submitted that the nine intermediate findings of fact enumerated [28] by the taxpayers in their brief are not inconsistent with the trial court's ultimate finding of no participation by any United States official in the raids conducted by the Philippine officials.

[28] On pages 53 through 54 of appellants' brief, a final inconsistency in the trial court's opinion is alleged wherein it is stated that the judge at the trial stated that he was going to have to find that there was participation. (Tr. 1243.) However, this quote from page 1243 of the trial transcript is truncated so as to present an apparent inconsistency. Actually, the trial judge at this point was discussing the statement contained in *United States* v. *Byars*, *supra*, at page 32, that "* * * mere participation in a state search of one who is a federal officer does not render it a federal undertaking * * *", and the trial judge was inquiring as to the quantum of participation by federal officers necessary to convert a search into a federal undertaking.

(3) Appellants' proposed findings of fact are not supported by the evidence

In urging that the trial court's finding of no participation by United States officials in the raids be set aside, the appellants advance the following proposed findings of fact: (a) there was no pending Philippine investigation prior to February or March of 1962 (App. Br. 56); (b) United States officials induced the Philippine authorities to make the raids (App. Br. 60); (c) Secretary Diokno's Hong Kong meeting was part of the participation by United States authorities in the Philippine raids (App. Br. 63); (d) the raids were planned in Mr. Chandler's house (App. Br. 64); and (e) Mr. Chandler actively participated in and supervised the raids. (App. Br. 65). In urging the adoption of these proposed findings, appellants have either ignored the evidence or have distorted it.

The first proposed finding is to the effect that there was no Philippine investigation prior to February or March of 1962. (App. Br. 56–60.) In support of this contention, the appellants cite pages 140 through 142 of the trial transcript. There is not one allegation on those pages which shows that there was not a Philippine investigation in existence prior to February 1962. Indeed, this contention completely ignores Secretary Diokno's testimony that there was such an investigation pending (Pltf. Ex. 12, pp. 14, 38, 52, 145) and it ignores the fact that early in January of 1962, Colonel Lukban requested information from Mr. Chandler concerning Stonehill (Tr. 463–465). Taxpayers also cite testimony on page 143 of the trial transcript as a basis for this contention. (App. Br.

59.) However, here again there is no statement that there was no investigation, only Colonel Lukban's response to the informer Spielman's request that action be taken against the taxpayers,[29] as is made clear on page 144 of the trial transcript. Accordingly, the contention of the taxpayers that there was no Philippine investigation pending before February of 1962 should be rejected.

The second proposed finding of fact advanced by the Taxpayers is that the United States officials induced the Philippine authorities to make the raids and, in support of their contention, reference is made to Defendants' Exhibits E and G, some unidentified testimony of Del Rosario, and Colonel Lukban's statements to Mr. Chandler on January 27, 1962. (App. Br. 60–62.) As to Colonel Lukban's statements on January 27, 1962, this was not a promise to Mr. Chandler but rather a promise to the informer Spielman. (Tr. 142–144, 995–996.)[30]

With respect to the alleged testimony of Del Rosario that Secretary Diokno briefed him on February 5th and that he only contemplated helping the

[29] The informer Spielman was bitter at the taxpayers who had beaten him and he was seeking the help of others to avenge himself on the taxpayers. (Tr. 442, 1089–1090, 1101–1102.)

[30] With respect to this statement of Colonel Lukban, Mr. Chandler testified (Tr. 144): "Actually I believe he was making that assurance to Mr. Spielman rather than to Mr. Hawley and myself." In this respect, Spielman was seeking to avenge himself on the taxpayers and this was Colonel Lukban's reply to Spielman's request; further, he stated (Tr. 995): "He stated to Spielman that he would check out his story, and if it checked out, that he would see that action was taken * * *."

Americans build a tax case (App. Br. 61), this is completely belied by Del Rosario's cross-examination wherein he states that he was introduced to Mr. Chandler in March of 1962 (at most two days before the raids) and at that time, he did not know what his duties were to be with respect to any liaison with Mr. Chandler nor did he know what the Stonehill case was about. (Tr. 887.) Also on cross-examination, Del Rosario admitted that his and the Philippine authorities' main interest in this matter was investigating Philippine crimes. (Tr. 901.) Finally, Secretary Diokno testified that he first advised Del Rosario of the Stonehill investigation on March 2, 1962, the day before the raid and, at that time, he told Del Rosario that the Philippine investigation had been going on for some years and that charges would be filed before the Deportation Board; but that he gave Del Rosario no other information at that time. (Pltf. Ex. 12, pp. 37–43, 115.) Secretary Diokno testified that he did not ask Del Rosario to help in the investigation of the taxpayers because of the need for secrecy and because Del Rosario possibly had some social contacts with the taxpayers. (Pltf. Ex. 12, pp. 97–100.) Secretary Diokno specifically negated the contention that the raids were carried out to assist the United States authorities but asserted that they were solely to establish violations of Philippine law (Pltf. Ex. 12, p. 52), and that he never received any requests from Mr. Chandler for help (Pltf. Ex. 12, pp. 19, 21, 43–44). Finally, there is Mr. Chandler's categorical denial that he asked the Philippine authorities to conduct the

raids for the United States tax case or that he participated in the raids. (Tr. 191, 268, 270–271, 319–320, 470, 979, 989.) Thus, the taxpayers' contention that the raids in question were instigated by or carried out at the request of the United States officials must be rejected.[31]

The third proposed finding of fact by the taxpayers is to the effect that Secretary Diokno's visit to Hong Kong to attempt to see Attorney General Kennedy somehow involved Mr. Chandler's participation in the raids. (App. Br. 63–64.) Secretary Diokno testified that he asked Mr. Hawley to attempt to arrange this visit (Pltf. Ex. 12, pp. 61–62; Tr. 155–156, 163–164) and that only when Mr. Hawley had trouble arranging it did Mr. Chandler give Secretary Diokno the name of the Chief of Security Police in Hong Kong, who put Secretary Dionko in touch with the Kennedy party in Hong Kong (Pltf. Ex. 12, p. 63; Tr. 163–164). Further, Secretary Diokno testified that he

[31] Taxpayers also claim that counsel for the United States have thwarted their efforts to prove this proposed finding of fact by not producing any reply to Mr. Chandler's memorandum of January 10, 1962 to his office (Deft. Ex. E), and various other unidentified correspondence. Every piece of relevant correspondence, memoranda, cablegrams, etc., whose existence has been identified in either the extensive discovery conducted on behalf of the taxpayers or at the trial have been produced and are in evidence. (Deft. Exs. A, B, D, E, F, G. AZ; Pltf. Exs. 1, 11; Tr. 95–96, 231–236, 241–242, 257–258, 976–978.) Taxpayers claim that Mr. Chandler must have received an answer from his office to Defendants' Exhibit E by January 27, 1962, the date of Mr. Chandler's meeting with Colonel Lukban (App. Br. 61); however, Mr. Chandler stated that he had not received any answer even as of February 12, 1962 (Deft. Ex. G; Tr. 130).

attempted to see Attorney General Kennedy and did see his aide, Mr. Seigenthaler, for the purpose of obtaining, at Philippine Government expense, the services of tobacco experts for use in the Philippine case (Pltf. Ex. 12, pp. 25–26, 61–63), but that he did not get any commitment from Mr. Seigenthaler and he never received the requested help (Pltf. Ex. 12, pp. 26, 169). Taxpayers refer to Defendants' Exhibit AZ as showing some sort of United States participation in the raids. Actually, this exhibit clearly shows that the Hong Kong visit was solely for the purpose of obtaining aid for the Philippine investigation. This exhibit is a cablegram back to the United States from Mr. Seigenthaler in which he reports that he met Secretary Diokno, that Secretary Diokno stated that the Philippine authorities had uncovered a huge fraud by the taxpayers concerning the Philippine tobacco industry and involving the forging of Philippine tobacco revenue stamps; further, Mr. Seigenthaler reported that Secretary Diokno requested the use of American tobacco experts and other help from the United States Government. Certainly, this meeting has nothing to do with the participation by United States officials in any raids.

The fourth finding of fact proposed by the taxpayers is to the effect that the raids were planned in Mr. Chandler's house. (App. Br. 64–65.) Messrs. Chandler and Hawley introduced the informer Spielman to Colonel Lukban of the NBI on January 27, 1962, at the United States Embassy in Manila, Philippines; the actual meeting itself was arranged by Mr.

Hawley. (Tr. 139–143, 1205.) The meeting occurred in the United States Embassy because Spielman was afraid for his life and would not be seen entering the NBI headquarters. (Tr. 141.) In this regard, it should be remembered that Spielman had received a beating from the taxpayers. (Tr. 99, 1101.) After this first meeting, the question arose as to where subsequent meetings between Spielman and the NBI should occur, and Spielman requested that they be at Mr. Chandler's house because he was still afraid of being seen at the NBI building. (Tr. 472.) This was agreeable to Colonel Lukban, who desired to keep the informer's movement sand whereabouts secret (Pltf. Ex. 12, p. 22); and Mr. Chandler acquiesced in this request (Tr. 472). Mr. Chandler stated that after January 27, 1962, the meetings at his house were between Spielman and NBI personnel (Tr. 146, 149, 998) and that he [Chandler] did not even attend all of them (Tr. 997–998). Mr. Chandler testified at length that he did not plan any raids either at his house (Tr. 149) or at Colonel Lukban's house (Tr. 320). The fact that the NBI officials may have interrogated Spielman at Mr. Chandler's house in their planning of the raids does not mean that Mr. Chandler planned the raids. Accordingly, this finding by the taxpayers should also be rejected.

The fifth finding of fact proposed by the taxpayers is that Robert Chandler participated in and supervised the raids by writing Defendants' Exhibits I and

J,[32] by his visit to Colonel Lukban's house and seeing there the search warrant on the evening of March 2, 1962, by commenting during that visit that the Army-Navy Club should be included in any raids, and by going to the premises of the United States Tobacco Corporation at the request of the Philippine authorities at 11:00 p.m. on March 3d, and pointing out to them the significant corporate records from an accounting viewpoint. As stated before in this brief,[33] Defendants' Exhibits I and J are not instructions at all, and they concern things germane only to the

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[32] With respect to Defendants' Exhibits I and J, taxpayers quote Mr. Chandler as stating that he did this to help with the raids. (App. Br. 65.) The quote is taken out of context and actually is (Tr. 366, line 13 through line 23):

Q. * * * Do you know [sic] recall writing those words?

A. I don't recall preparing it.

Q. Does this language recall to you that you did give instructions to the NBI prior to the raids or advice?

A. Well, I did relay some—did help Spielman get some of his information to them, because they didn't understand each other.

Q. And you did this to help with the raiders, is that correct?

A. I presume that would probably be used in the raids, yes.

Mr. Chandler also testified that he did not remember when these exhibits were written (Tr. 351, 363, 367, 370, 373, 1048), but that he wrote such things for Spielman (Tr. 331, 356–357, 366, 373, 1048–1049) and he did not give any such written papers to the NBI (Tr. 359, 1048–1049). Thus, it is seen that Mr. Chandler had no knowledge as to whether the NBI used these in the raids but he presumed that they may use such papers the same as they used the other information Spielman gave them.

[33] See pages 47 to 49, *supra*, of this brief.

Philippine tobacco and revenue stamp investigation.[34] Mr. Chandler testified that he reduced such things to writing at Mr. Spielman's request so as to relay it to the NBI. (Tr. 331, 351, 353, 356, 366, 368, 373, 1048–1049).

With respect to the visit to Colonel Lukban's house on the evening before the raid and his cursory perusal of the search warrant, this too has been analyzed earlier in this brief.[35] Suffice it to say that Mr. Chandler categorically denies that he helped the NBI agents compose the text of any such warrants or that he told them what his interest was in the matter, or that he was interested in any type of financial records. (Tr. 316.) Mr. Chandler states that he advised the Philippine officials after the raids on March 3d, and not before the raids, that the type of records he was interested in were financial records. (Tr. 316–317.) More specifically, Mr. Chandler testified that he did not tell Colonel Lukban of the type of evidence he was interested in until 10:00 p.m. on March 3d after the raids had taken place. (Tr. 325–328.) Finally, it should be noted that the warrants actually used or the applications for the warrants are not what were shown to Mr. Chandler at Colonel Lukban's house. (Tr. 344–345, 1007–1008, 1010–1011; Deft. Exs. H, N.)

As for Mr. Chandler's suggestion that the Army-Navy Club premises be included in the raid, this was

[34] Compare the notations on Defendants' Exhibits I and J with Secretary Diokno's description of the Philippine investigation set forth in Defendants' Exhibit AZ.

[35] See page 44, *supra*, of this brief.

no more than a suggestion as he could not direct the NBI to do anything.[36] Further, the testimony of Mr. Chandler shows that this was nothing more than a suggestion or comment prompted by curiosity of what the informer Spielman had told both the NBI personnel and Mr. Chandler. (Tr. 319.)[37]

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[36] See pages 45 to 47 of this brief wherein this episode is analyzed at length.

[37] The testimony concerning this suggestion is as follows (Tr. 319, line 8 through 320, line 21):

The COURT. May I ask you a question: Why did you tell him to include the Army-Navy Club?

A. Spielman had referred to the Army and Navy Club in one of his very—in one of the earliest interviews that we had with him, and it intrigued me, and when—we hadn't really covered the situation too thoroughly, but when we went down to the basement of Colonel Lukban's house, Danny sat down immediately and started typing, and I don't know whether it was he or that Colonel Lukban said it, but they advised me that he was typing warrants, but he didn't type long, so evidently most of it had been done before, and then he said, "Well, that finishes it," and he made a count, I don't recall at the moment what the count was, but I suppose more out of curiosity because of my original curiosity of the Army-Navy Club, I asked him did that include the Army-Navy Club.

The COURT. Well, now, this morning I believe it was you testified that you did not participate or any of your helpers did not participate in the raid.

A. That is right, sir.

The COURT. All right. I want to go one step further. Did you participate in the preparations for the raid?

A. Well, perhaps to this extent: This man Spielman, the informer, was a very unusual individual and he had no confidence, trust in the Filipinos, and he was not understood by them: he was overbearing, he was a very unusual character, and he quite often would come to me and say that "They don't understand me, if you would talk to them," and so I would sometimes try to express what Spielman was trying to tell them.

The COURT. Well, now, are you trying to tell me that you participated in the planning of this raid?

A. No.

The COURT. Well, if you didn't participate in the planning, why did you tell them to include the Army and Navy Club?

A. Because the location intrigued me. It was——

Counsel for the taxpayers also state that Mr. Chandler supervised the raids by observing the raid of taxpayers' premises as well as Stonehill's office in the former Cuban Embassy, and selecting records for the United States tax investigation at a warehouse of the United States Tobacco Corporation while a raid was in progress. Nowhere in the record is there any evidence that Mr. Chandler supervised and directed any raids of the Cuban Embassy or any other of the taxpayers' premises. Taxpayers cite pages 393 to 394 and page 400 in support of this contention. (App. Br. 68.) On pages 393 to 394, it is revealed that Mr. Chandler left his two assistants waiting for Colonel Lukban near the NBI headquarters and he visited Colonel Lashinsky, who was attached to the United States Embassy and who lived in the Carmen Dewey Apartments, near the former Cuban Embassy. Mr. Chandler admitted that, from this vantage point, he could see some activity next door, but there is no evidence connecting Mr. Chandler in any way with that raid. As for taxpayers' contentions that Mr. Chandler thereafter drove to other places where raids were in progress, the taxpayers rely on a citation to page 400 of the trial transcript. There is nothing on page 400 to support such a contention. Page 400 of the trial transcript contains an account of Mr. Chandler's visit with Colonel Lukban at 10:00 p.m., on March 3d; i.e., nine hours after the raids, which occurred at 1:00 p.m. Further, the testimony concerning this meeting is to the effect that Mr. Chandler was given too understand by Colonel Lukban that

the raids were over. (Tr. 401.) Thereafter, Colonel Lukban requested Mr. Chandler to go to the warehouse of the United States Tobacco Corporation and help his NBI men there segregate, from an accounting point of view, the more important corporate records. (Tr. 1021, 1142.) Mr. Chandler went to the corporation's warehouse with an NBI agent and he put aside a few corporate records. (Tr. 1020, 1142–1148.) Mr. Chandler and Mr. Ragland were at the warehouse for approximately one-half hour (Tr. 1024), and then Mr. Chandler visited the main office of that company for about five minutes (Tr. 1026). However, neither Mr. Chandler nor Mr. Ragland selected any records for the United States tax case, as contended by the taxpayers (App. Br. 68–69), and, as a matter of fact, they selected only an old corporate ledger and some supporting records which they left behind and never saw again (Tr. 1147–1149). This was not done to further any United States investigation but was done to help the Philippine authorities in their case. As Mr. Chandler testified, he reluctantly agreed to do this, but since he had already been refused access to the documents once, he thought he better cooperate with Colonel Lukban. (Tr. 1020.)

It is submitted that all of the instances of participation cited by the taxpayers involve conduct of the agents in either passing information to the Philippine authorities at least twelve hours prior to any raids, or acts of the United States officials which occurred at least nine hours after the raids and which

were performed at the request of and for the accom
modation of the Philippine authorities. Further, non
of the acts cited by taxpayers involve the selectio
by United States officials of evidence to be seize
at the scene of any raids for use in any United State
investigation, nor do any of these acts involve th
United States officials acquiring possession of evi
dence at the scene of the raids for use in subsequen
federal investigations. Therefore, none of the act
cited by the taxpayers lie within the definition o
participation, as defined by the cases cited in Argu
ment I of this brief.

(4) Conclusion of Argument II

As stated above, the so-called intermediate finding
of the trial court are not in conflict with the tria
court's utimate finding of no participation by Unite
States officials in the raids. Further, the acts of th
United States agents which the taxpayers argue con
stitute participation in the raids conducted by th
Philippine authorities either are not supported b
the record, or in fact are acts which occurred twel
hours prior to the raids or ten hours after the raid
and do not involve United States officials being pre
ent at the time and place of the raids or selectin
any evidence at the scene of the raids for later use b
the United States. Accordingly, these acts do not co
stitute participation as defined in *Byars* v. *Unite*
States, supra, and *Lustig* v. *United States, supr*
It is further submitted that there is clear and co
vincing evidence in the record supporting the tri
court's findings that the raids in question were the cu

mination of a Philippine investigation and were not requested or instigated by the United States, and that no official of the United States participated in these raids. Therefore these findings cannot be deemed to be clearly erroneous.

It is axiomatic that the findings of fact of a trial court will not be set aside unless clearly erroneous. *Crescent Wharf & Ware.* v. *Compania Naviera de Baja Calif.,* 366 F. 2d 714, 718 (C.A. 9th); *McGuire* v. *United States,* 349 F. 2d 644, 646 (C.A. 9th); *Paul Sachs Originals Co.* v. *Sachs,* 325 F. 2d 212, 214 (C.A. 9th); *Coast Metals, Inc.* v. *Wall Colmonoy Corporation,* 315 F. 2d 416, 418 (C.A. 9th); *United States* v. *Grissler,* 303 F. 2d 175, 176 (C.A. 9th); Federal Rules of Civil Procedure, Rule 52(a). It is submitted, therefore, that the trial court's findings of fact should not be set aside but should be upheld by this Court and the trial court's order denying the motion to suppress should be affirmed.

III. The exclusionary rule of evidence used to enforce the Fourth Amendment does not apply to the instant civil suit

In order to deter overzealous federal law enforcement officials from infringing upon the rights of private individuals under the Fourth Amendment, the Supreme Court, acting in its supervisory role over criminal justice in federal courts, created the evidentiary rule that evidence obtained by federal officials in violation of a person's rights under the Fourth Amendment would not be used in a criminal prosecution of that person. *Elkins* v. *United States,* 364 U.S. 206; *Weeks* v. *United States,* 232 U.S. 383. This evi-

dentiary rule is not so applied, however, as to exclude the use of such evidence for impeachment purposes. *Walder* v. *United States*, 347 U.S. 62. If the accused took the stand in his own defense, the prosecution could then utilize such evidence so as to impeach the testimony of the accused.

In the criminal case entitled *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, the Court stated (p. 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

The *Silverthorne* case was relied upon in 1938 by the Court of Appeals for the First Circuit in *Rogers* v. *United States*, 97 F. 2d 691, as authority for holding the exclusionary rule of evidence to be applicable in a civil case.[28] However, since then, the language used in *Silverthorne* has been restricted, as the Supreme Court stated in *Walder* v. *United States*, *supra*, (p. 65):

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradic-

[28] See also the 1938 case of *Schenck* v. *Ward*, 24 F. Supp. 776 (Mass.), which followed the *Silverthorne* case, *supra*, and *Rogers*, *supra*, decision.

> tion of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Further, Justice Goldberg stated, in a concurring opinion in *Cleary* v. *Bolger,* 371 U.S. 392 (p. 403): "* * * the effect of the Fourth Amendment in civil cases in the federal courts is not totally settled." Accordingly, it is submitted that the reliance placed upon *Silverthorne, supra,* by the First Circuit in *Rogers* v. *United States, supra,* is in error.

There is a line of cases involving forfeiture in which the exclusionary rule has been applied on the ground that the cases were quasi-criminal in nature. *Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693. Prior to the *Plymouth* decision in 1965, the lower courts split on the applicability of the exclusionary rule of evidence in forfeiture cases, according to whether they determined a forfeiture case to be quasi-criminal in nature.[39] Besides the forfeiture cases, there have been several other instances in which the courts have determined that a suit was quasi-criminal in nature and that the exclusionary rule of evidence was applicable.[40]

The number of civil suits which have been deemed not to be quasi-criminal in nature and which have considered the applicability of the Fourth Amendment

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[39] The Supreme Court noted this conflict in its opinion in *Plymouth Sedan, supra,* at page 696.

[40] See: *Powell* v. *Zuckert,* 366 F. 2d 634 (C.A.D.C.), which was a proceeding to discharge a Government employee. See also: *Saylor* v. *United States,* 374 F. 2d 894 (Ct. Cl.), which likewise involved a proceeding to discharge a Government employee and which applied the exclusionary rule, citing *Powell* v. *Zuckert,* supra.

to civil suits are of limited number. See: *Rogers* v. *United States, supra; Schenck* v. *Ward, supra; Compton* v. *United States,* 334 F. 2d 212 (C.A. 4th); *Lassoff* v. *Gray,* 207 F. Supp. 843 (W.D. Ky.); *Militare* v. *Scanlon* (E.D.N.Y.), decided on March 9, 1966 (17 A.F.T.R. 2d 776); *United States* v. *Chase* (D.C.), decided on December 21, 1966 (67–1 U.S.T.C., par. 15, 733). The *Rogers* case, *supra,* and the *Schenck* case, *supra,* were not tax cases and, as stated before, they rested upon the broad and sweeping language of *Silverthorne Lumber Co.* v. *United States, supra.* In *Lassoff, supra,* which was an injunction suit, the court held that evidence obtained in an illegal raid could be used to impeach a taxpayer. In *Militare, supra,* the District Court for the Eastern District of New York held that a tax assessment could be based solely upon evidence obtained in violation of the Fourth Amendment, whereas in *Chase, supra,* the District Court for the District of Columbia held that a tax assessment could not be based solely upon such evidence. In *Compton* v. *United States, supra,* the Court of Appeals for the Fourth Circuit held that in a tax refund suit the United States could use evidence obtained in violation of a taxpayer's rights under the Fourth Amendment to impeach and rebut the contentions of the taxpayer, citing *Walder* v. *United States, supra.*

As held by the court in *Militare, supra,* the presumption of correctness attaching to a tax assessment is not based upon an inference of facts rooted in probability but rather is based on policy; and therefore, it is not germane to consider what evidence the tax

authorities considered in making the assessment. Taxpayers must rebut or overcome the presumptive correctness of an assessment in order to defeat the collection of taxes. *Brunton* v. *Commissioner,* 42 F. 2d 81 (C.A. 9th), certiorari denied, 282 U.S. 889; *United States* v. *Lease,* 346 F. 2d 696 (C.A. 2d). Under the rationale of *Compton, supra,* and *Walder* v. *United States, supra,* evidence seized in violation of the taxpayers' rights is admissible to impeach the statements of the taxpayers as contained in their pleadings filed herein and in such testimony as they may offer herein. As the Supreme Court in *Walder* has precluded the issue of the exclusionary rule as a shield to escape the obligation of truthfully testifying, it would be illogical to invoke this rule so as to preclude the Government from testing the verity of a taxpayer's statements as contained in a tax return or in his testimony in a trial on the issue of his tax liability.

Since the payment and collection of income taxes is not punitive or quasi-criminal in nature,[41] and since the

[41] Taxpayers argue (App. Br. 24) that since the instant case involves the 50% penalty imposed upon fraudulent tax returns, this suit is quasi-criminal in nature, citing *Boyd* v. *United States*, 116 U.S. 616; *Helvering* v. *Mitchell*, 303 U.S. 391; *Tovar* v. *Jarecki*, 173 F. 2d 449 (C.A. 7th); and *Lassoff* v. *Gray*, 207 F. Supp. 843 (W.D. Ky.). The *Boyd* case involved a forfeiture. *Tovar* v. *Jarecki*, *supra*, did not involve any income tax proceeding, but rather, the court in that case held that a suit to collect a 100% tax imposed upon the transfer of marijuana did not involve a tax statute, but a penal statute, and that, therefore, the Fourth Amendment and its exclusionary rule of evidence was applicable to a suit to collect such a tax. In the *Lassoff* suit, the trail court refused to enjoin the collection of an assessment based upon evidence seized in violation of the

central issue to be decided is the true facts underlying the taxpayers' denial of liability for the taxes assessed for the years involved, even if this evidence were seized in an illegal raid in which United States officials participated, it should be deemed admissible in the instant action with respect to the issue of the tax liabilities of the taxpayers for the years involved. Thus, it is submitted that the exclusionary rule of evidence used to enforce the Fourth Amendment should be held to be not applicable to the instant suit.

IV. Taxpayers have not established standing to suppress any evidence

It has generally been held that for a person to have standing to question the legality of a search or seizure, the person must claim: ownership in or a right to possession of the property seized, or the premises searched, or that he was legally present on the searched premises at the time of the search. *Jones* v. *United States,* 362 U.S. 257; *Hill* v. *United States,* 374 F. 2d 871 (C.A. 9th), certiorari denied, 389 U.S. 842; *Diaz-Rosendo* v. *United States,* 357 F. 2d 124 (C.A. 9th), certiorari denied, 385 U.S. 856. The United States raised in its opposition to taxpayers' motion to suppress the issue of the standing of the taxpayers to move to suppress all the evidence re-

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Fourth Amendment and held that such evidence could be used to impeach the taxpayer. In *Helvering* v. *Mitchell, supra,* there was no question concerning the Fourth Amendment, but the court stated that this 50% penalty was not a punitive sanction but, rather, a remedial sanction to reimburse the United States for the expense of investigation and the loss resulting from the taxpayer's fraud.

ceived by the United States from the Philippine officials. (R. 36–37.) The trial court at the hearing on taxpayers' motion to suppress, stated that it was deferring the issue as to the standing until it first determined whether any United States officials had participated in the raids in the Philippines. (Tr. 722.) Inasmuch as the trial court determined that there was no such participation, it did not pass on the issue of standing. (R. 43–57.)

Many of the premises and records seized belonged to Philippine corporations which the taxpayers managed or in which they owned stock. (R. 45; Deft. Ex. AW.) In *Hill* v. *United States, supra,* the Court of Appeals for the Ninth Circuit expressly held that a sole stockholder of a corporation did not have standing, *per se,* to question the search and seizure of his corporation's premises and records and, in so holding, the Court quoted with approval *Lagow* v. *United States,* 159 F. 2d 245, 246 (C.A. 2d), certiorari denied, 331 U.S. 858, as follows (p. 873):

> "When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity. * * *"

Accordingly, if it is found that United States officials participated in the raids in the Philippines and that the exclusionary rule of evidence, which is the sanction used to enforce the Fourth Amendment, is applicable to the instant civil suit, then the matter should be remanded, with appropriate instructions for a determination by the trial court as to the standing of the taxpayers to suppress the various items of evidence received by the United States from the Philippine officials.

CONCLUSION

In view of the foregoing, it is submitted that the trial court's order should be affirmed as its findings of fact are not clearly erroneous but are supported by clear and convincing evidence. In the event that the findings of the trial court are set aside on the grounds that there was participation by United States officials in the raids in the Philippines, it is submitted that the trial court's order should be affirmed because the exclusionary rule of evidence does not apply to civil suits of the instant nature. It is further submitted that if the exclusionary rule of evidence is held to be applicable to the instant civil suit this matter should be remanded to the trial court with appropriate instructions to determine the stand-

ing of the taxpayers to suppress the evidence received by the United States from the Philippine officials.

Respectfully submitted.

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APRIL 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: —— day of April, 1968.

JOHN J. MCCARTHY,
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APPENDIX

Analysis of Testimony of Major Del Rosario

Although taxpayers did not lay any great emphasis or cite the testimony of their witness Major Del Rosario in their opening brief on this appeal, it is anticipated that they may in their reply brief. Accordingly, his testimony is being analyzed here so as to point out that no reliance should be placed on his testimony because of its inconsistencies and because of the lack of opportunity for the witness to observe the facts about which he was testifying.

At the trial level, the taxpayers alleged that Major Del Rosario worked with Mr. Chandler in the planning of the raids, meeting at the offices of the Department of Justice and the NBI, and at luncheons and dinners; and that Mr. Chandler told Major Del Rosario that he wanted vouchers, accounting forms and books of account. It was impossible for Major Del Rosario to work with Mr. Chandler in planning of the raids inasmuch as Major Del Rosario, himself, admitted upon cross-examination that he did not know of the imminence of the raids on March 3 until one or two days prior to this date. (Tr. 894.) Further, Secretary Diokno states in his deposition that he purposely did not advise Major Del Rosario as to the planned raids against Stonehill and Brooks until one day prior to the raids (Pltf. Ex. 12, p. 37), because he did not wish a leak concerning the planned raids and because Major Del Rosario was somewhat of a

playboy who moved in the same social circles as Stonehill and Brooks (Pltf. Ex. 12, pp. 97–99). Further, no reliance should be placed upon Del Rosario in this matter because of the confused nature of his testimony. This is witnessed, *inter alia,* by the fact that on direct examination, he stated that he first knew about the Stonehill matter when he was first introduced to Mr. Chandler (Tr. 831); however, later, on cross-examination, he stated that he became a liaison man between Mr. Chandler and Secretary Diokno prior to hearing about the Stonehill case (Tr. 887–888). Further, on cross-examination, Major Del Rosario was asked about his alleged meetings with Mr. Chandler prior to the raids and he stated that it was possible that he had met with Mr. Chandler two or three times, or maybe more, prior to the raids (Tr. 891.) Major Del Rosario did meet Mr. Chandler two or three times when Mr. Chandler accompanied Mr. Spielman to the Department of Justice to confer with Secretary Diokno (Tr. 892); and at these conferences, Mr. Chandler remained in the outer room awaiting the break-up of the conference (Tr. 892) and he passed the time of day with, and tried to elicit information from, Major Del Rosario (Tr. 916–917). Thus, the one or two meetings between Mr. Chandler and Major Del Rosario were not concerned with any planning for raids as Major Del Rosario knew nothing about them, but, in fact, were accidental meetings occurring while Mr. Chandler was awaiting the termination of certain conferences between Spielman and Secretary Diokno. Further, at these chance confrontations, Mr. Chandler fruitlessly tried to "fish" for information from the unknowing Major.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22346

HARRY S. STONEHILL AND ROBERT P. BROOKS, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal From the United States District Court for the Central District of California

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APPELLANTS' REPLY BRIEF

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22346

HARRY S. STONEHILL AND ROBERT P. BROOKS, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the Central District of California

APPELLANTS' REPLY BRIEF

OPINION BELOW AND JURISDICTION

The sections entitled "Opinion Below" and "Jurisdiction" in Appellee's brief do not differ substantially from those in the brief submitted by Appellants.

QUESTIONS PRESENTED

The "Questions Presented" as formulated by Appellee are not the questions presented on this appeal. As stated by Appellee, the questions assume findings of fact not made by the trial Court (proposed Question #1, G. Br. 2*) and introduce issues not raised below (proposed Question #2, G. Br. 2); (proposed Question #3, G. Br. 3).

STATEMENT IN REPLY

Appellee's "Statement" contains a great number of omissions and distortions. Because of space limitations, imposed by Rule 18(g)(4) of the Rules of this Court, only a few of them can be met below:

* Appellee's brief will hereafter be referred to as Government's Brief, (G. Br. —).

a. U. S. Investigation of Appellants' Tax Liabilities Prior to the Raids

Appellee claims in its "Statement" that no United States investigation of Appellants was commenced until after the unlawful raids of March 3, 1962. Appellee goes so far as to contend that the U. S. investigation of Appellants did not begin until March 8, 1962, when Special Agent Powers arrived in Manila and the case was formally assigned to him (G. Br. 6)—if not until two weeks later, when a fraud jacket was officially opened in Washington. (G. Br. 17). Appellee further contends that a Philippine investigation of Appellants preceded all U. S. interest in Appellants and was begun in 1959 or 1960 and that this Philippine investigation continued and was the cause of the illegal raids (G. Br. 7, 8), with the United States an uninvolved and innocent bystander.

The facts and the evidence are to the contrary:

(i) *"IRS (Internal Revenue Service's) interest in the above captioned taxpayer [Appellant Stonehill] begins as far back as 1954"*. Thus Chandler wrote to Washington on December 22, 1961 [Pl. Exh. 11, line 1].

(ii) As of August 31, 1960 a considerable number of items relating to Appellant Stonehill were in the files in Manila and a "fairly substantial file" relating to Appellant Stonehill was being kept in the Washington I.R.S. Office in its "O:PO:F:O" section [Def. Exh. A].

(iii) All of Chandler's work, from the middle of December through January, February and until Powers' arrival on March 8, was devoted exclusively to investigative activities with regard to Appellants (Tr. 112, 113, 122, 126, 139, 271, 273, 447 et seq.).* (Def. Exh. E). This investigative activity included ascertaining the locations of Appellants' financial records for later seizure (Tr. 991). Chandler as Internal Revenue Representative in the Far East was the "top dog" in the Far East (Tr. 66), authorized to make investigations on all Internal Revenue matters that "ARISE in the area" (Tr. 66, 69).

Appellee's contention (G. Br. 6, 7, footnote 5) that Chandler's, Reynold's, and, later, Ragland's work on this case in December, January, February and early March,

* Tr.—Transcript of Hearing.

prior to the arrival of Special Agent Powers, does not constitute "investigative activity of the taxpayers' liabilities" (G. Br. 6, footnote 5), because Chandler did not *formally* assign such investigation to anyone under him, ignores evidence and reality.

b. There Was No Antecedent Phillippine Investigation of Appellants

Appellee states: "At the beginning of February of 1962 the 'then' Secretary of Justice, Jose Diokno, became involved *with the investigation of the taxpayers by the NBI"* (G. Br. 9). (Emphasis supplied.)

No "investigation" of the taxpayers by the NBI was in progress when Diokno (who had been in office for less than a month) [Pl. Exh. 12, p. 13] became involved. At the January 27 meeting, when Chandler told Lukban that he (Chandler) already had asked for additional U. S. agents to help him on his Stonehill investigation, Colonel Lukban *"promised"* Chandler and Hawley that he *would* (in the future) inquire into the Spielman allegations and, if Mr. Spielman's story was found to be correct, he *"would"*, then investigate Stonehill. (Tr. 143). Having promised Chandler to investigate, Lukban asked for Diokno's approval before he even began to investigate Appellants. (Pl. Exh. 12, p. 14).

c. Diokno Did Not Decide on Raids—He Approved Lukban's Decisions, Which Had Been Arrived at in Consultation With U. S. Officials

Appellee states:

> "Around the time of the Hong Kong trip by Secretary Diokno, Secretary Diokno 'decided' to have the taxpayers arrested and their companies' business premises raided in connection with the NBI's investigation." (G. Br. 9). (Emphasis supplied).

The record shows that raids* were discussed between Chandler and Secretary Diokno before the February 12 visit to Hong Kong (Tr. 985, Chandler). Raids were again discussed in Hong Kong with Kennedy's assistant (Tr. 167-

* Raids were planned and carried out against residences as well as offices. (See Exh. AW).

Chandler). Diokno told Seigenthaler that the raids would not be through "ordinary government channels" (Exh. AZ).

Diokno never decided on raids. Diokno only approved Lukban's plans for the raids which plans Lukban and his assistant director, Nocon, had worked out with Chandler at the meetings at Chandler's house. (Tr. 278, 279, 280) (Pl. Exh. 12, page 29).

d. Chandler and the Pre-Raid Briefing at Colonel Lukban's Home

Appellee's statement:

> (i) "On the night of March 2, 1962, Mr. Chandler was contacted by an aide of Colonel Lukban who requested that he see Colonel Lukban at his home (Tr. 1066). Upon reaching Colonel Lukban's house, he found a large number of NBI personnel there speaking the Tagalog language." (G. Br. 10).

With regard to the same meeting, Chandler testified (Tr. 313):

> "The Court: This was in the Philippines?
> A. Yes, sir.
> The Court: The language is Spanish, isn't it?
> A. No, your Honor. It's English.
> The Court: Do they all talk English?
> A. Yes.
> The Court: And did this conversation all occur in English?
> A. Yes, sir."

(ii) Appellee tries to give the appearance of innocent small talk to a most important incident when Chandler, on the morning of the raids, approved in advance the language of the warrants delineating the type of evidence to be seized (G. Br. 10).

The evidence shows that Colonel Lukban read to Chandler the specific section of the warrants which described *what was to be* seized. (Tr. 312). This language—identical on all warrants—uniformly called for the seizure of evidence important only to the U. S. tax investigation (Exhs. M-Z, AA-AL).

Chandler had explained to Lukban, Diokno and Del Rosario the need for this type of evidence prior to the raids. (Tr. 328, 847, 848).

e. The Selection by Chandler of the Army Navy Club as Raid Target

Again Appellee tries to minimize and gloss over an important incident of instigation and participation, which occurred at the same team leader's briefing session the night before the raids. Its Brief claims:

> (i) "Mr. Chandler testified that he did not answer any questions of the NBI team leaders concerning these raids at Colonel Lukban's house, and from his observation, their presence at Colonel Lukban's house was of a social nature. . . "
> (G. Br. 12).

and

> (ii) "Mr. Chandler did not know what premises were going to be raided or how many search warrants were going to be issued; however, '*out of curiosity*' [emphasis supplied] Mr. Chandler inquired as to whether the NBI intended to include some premises at the Army-Navy Club, rented by a Karl Beck, in the raid." (G. Br. 11).

But here is what Chandler did do on this "social" occasion, the night before the raids:

> "Q. Did you give any advice or any request to [Assistant NBI director] Nocon?
> A. Yes.
> Q. All right. What did you say to him?
> A. Well, he finished typing these warrants, as he called them, and he counted them and I asked him casually did he have the—he counted them and said so many.
> Q. Do you remember how many he said?
> A. I have a recollection of 24, I don't know why, but then I said, asked him, 'Does that include the Army-Navy Club?' He said, 'No'.
> Q. What did you say then, if anything?
> A. *Well, I told him I thought that was a place they should go to.*"* (Emphasis supplied). (Tr. 1009).

Chandler requested the search of this location not out of "curiosity" but only after he had made his own careful personal investigation by going there (Tr. 346). He had

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* "Whereupon it appears that the Army-Navy Club premises were included in the raid". (G. Br. 11).

received the lead to this all important location of Appellants' private and confidential papers from Spielman (Tr. 345).

f. When Chandler, Reynolds and Ragland Joined Lukban in his Office, Raids Were Still in Progress

> "At about 10:00 p.m., . . . [M]essrs. Chandler Ragland and Reynolds went to Colonel Lukban's office and . . . were given to understand, at that time by Colonel Lukban, that the raids had been accomplished, although the NBI remained in possession of many of the raided premises. * * *" (G. Br. 14).

Chandler was not given to understand that the raids had been concluded. On the contrary, Lukban specifically indicated to Chandler that the agents were still searching various premises (Tr. 401).*

g. The United States Agents Physically Searched Premises, Selected and Seized Evidence While the Raids Were in Progress

Appellee's statement:

> ". . . While they were there [at Lukban's office] an NBI agent entered and told Colonel Lukban that he had *seized* a large volume of corporate records at a warehouse of the United States Tobacco Corporation." (G. Br. 14) (Emphasis supplied).

The NBI agent had "encountered" (not seized) a large quantity of records (Tr. 339). Some of these records were later seized by the U. S. Agents. In an attempt to minimize this actual seizure conducted by the U. S. agents during the raids, the government in its statement describes it as follows:

> "Messrs. Chandler, Reynolds and Ragland were taken to the warehouse by an NBI agent and they found there a large quantity of old corporate records in a storage area; they pointed out an old general ledger of the corporation and some supporting books as being the more significant records from an accounting point of view and they left. They made no detailed examination of these records, they took no records with

* Raids continued for several days after March 3 (Tr. 863).

them, they do not know what the Philippine authorities did with them, and they have never seen these old records since." (G. Br. 15).

Actually, according to Chandler's own testimony, Chandler and the other two U. S. agents selected and seized what *they* thought was important.

"A. I think that anything we thought was of any—was important, we put into a cardboard carton there.
The Court: You say "what we thought". Now, what do you mean by "we"?
A. Myself and the other agents.
The Court: That is United States agents?
A. Yes.
The Court: How many were there at that time?
A. There were three of us.
The Court: And when you say "we", you include all three?
A. Yes." (Tr. 406).

Obviously, what the United States agents thought important must have been what was important to the U. S. case. Neither Ragland, Reynolds, nor Chandler, knew what kind of evidence (if any) the Philippine authorities were looking for.

Again, according to Chandler, whatever they thought was important, they (the U. S. agents) put into cartons.* True, they did not take the records with them, but they told the NBI agents to take the material they had selected to headquarters, where they would later copy it, in accordance with their antecedent agreement with Lukban. The reason that these three agents did not see the records again, is that another agent, Leyden, was sent to Manila to analyze and copy this type of record. Throughout Chandler's presence at this location, the NBI agents were still searching and, in fact, consulted Chandler (Tr. 649). Chandler himself searched the entire warehouse, looking for (among other things) cigarette paper (Tr. 650) because "Spielman had talked a great deal about it" (Tr. 410). While Chandler, Ragland and Reynolds selected records,

* None of the records selected by the U. S. agents (as Mr. Chandler testified in response to a question by the Court) had been moved from the place where they were originally found (Tr. 409-410).

"the NBI's . . . kept on searching the place" (Tr. 650), i.e., the raids were far from concluded.

In order to explain the continued presence of the NBI agents after the U. S. agents had left, Appellee states that "the NBI retained possession of many of the corporate premises for several years, including the premises of United States Tobacco Company." (G. Br. 14).

Again the record is misquoted. The witness in question stated that U. S. Tobacco Corporation was closed for two weeks and, after re-opening, operated for two years "under *Government* (not NBI) control" (Tr. 610, 611). There is no evidence whatever that the NBI kept possession or control of U. S. Tobacco Corporation, and as a matter of fact, it did not.

The above selections are mere examples, significant of Appellee's attempts to minimize the gravity of the U. S. actions in Manila. To make a complete analysis of all omissions and misstatements in Appellee's "Statement" would require more space than is available. Suffice it to add that Appellee in its "Statement" completely failed to recite any facts which would provide an innocent explanation of Mr. Chandler's written instructions to the NBI as to where to search and what to seize (Exhs. I and J). Appellee's argument that excise tax stamps (one of the items Chandler specified for seizure on Exhibits I and J) had nothing to do with the U. S. tax case (G. Br. 49) does not stand up. The core of Appellee's net worth case is that the "likely source" for Appellants' net worth was the sale of untaxed cigarettes bearing illegal stamps. (Pl. Ex. 11, p. 3).

Chandler wanted this very evidence. He expected that the instructions contained in Exhibits I and J as to where to find it, would be used in the raids (Tr. 366).*

Appellants, for the Court's convenience, have attached as Appendix to this Reply Brief a chronology, reciting the most important events bearing on the issues in this case. It points up how many facts were omitted or glossed over in Appellee's Statement.

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* The Court is also referred to pages 10 and 11 of our main brief in this connection, showing Chandler's own admission that he had seen a picture folder prepared by the NBI prior to the raid (Tr. 341) and that the words, "Comments on USTC picture folder" may well have been written by him while he looked at it. (Tr. 1076).

SUMMARY OF ARGUMENT

A. THE LAW

1. There is no authority for Appellee's contention that federal "participation" in an illegal search must be "substantial" to require suppression. Nor is there authority for Appellee's argument to the effect that such "substantial" federal "participation" requires (a) the presence of the federal agent at the initiation of the raid and seizure; (b) the examination and sifting of articles turned up by the search and (c) a decision by him as to what evidence must be seized and retained for use in the subsequent federal prosecution. The quantum of "participation" required by the Courts for application of the Fourth Amendment to foreign searches is, that it goes beyond "mere" or "incidental" participation. Yet, even applying Appellee's standards, the facts in the instant case spell such "substantial participation" as to require reversal of the holding of the District Court.

2. Appellee's reliance on Rule 52(a) F.R.C.P. is misplaced. Certain of the trial Court's findings of fact (see Appellants' Opening Brief, pp. 45, 46) are not in issue. It is the trial Court's *misinterpretation* of these facts and its disregard of other evidence that this Court is asked to review and to reverse.

This Court is free to do so, unfettered by Rule 52(a). *Stevenot* v. *Norberg,* 210 F. 2d 615 (C.A. 9, 1954); *Sears, Roebuck & Co.* v. *Johnson,* 219 F. 2d 590 (C.A. 3, 1955). The decision of the Court below rests solely on its finding of ultimate "fact", which actually constitutes a conclusion of law,* to the effect that there was no instigation of the raids within the purview of *Brulay* v. *U.S.,* 383 F. 2d 345.

As to the few findings of intermediate fact that the Trial Court made in apparent support of its erroneous conclusion of law that there was no "instigation" or "participation" within the purview of *Brulay,* supra (enumerated on p. 55 of our Main Brief), it has been shown that these findings were clearly erroneous and unsupported by the evidence

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* The Trial Court in its opinion did not make formal Findings of Fact and Conclusions of Law. Thus its findings and conclusions are not so labeled, or separately stated by the Court.

and therefore must be set aside by this Court under Rule 52 F.R.C.P.

3(a) Appellee did not raise in the District Court the issue as to whether suppression of illegally seized evidence lies in civil cases. The trend of the cases cited in our main brief and current Government policy is to the effect that suppression does apply in civil cases and particularly in cases involving penalties.

3(b) Appellee's reliance on *Walder* v. *U.S.*, 347 U.S. 62, 74 S. Ct. 354 (1954) as an authority which would permit the use of illegal evidence to contradict Appellants' tax *returns,* is misplaced. *Walder* permits no more than impeachment of the *credibility* of a defendant who has taken the stand in a criminal case.

4. Appellants have "standing" to move for suppression because most (if not all) of the records seized were their personal records, and/or were seized in their personal offices and held by appellants in their personal capacity. The fact that some of these records were located and seized in the offices of corporations managed, owned or controlled by Appellants, does not deprive Appellants of "standing". *Jones* v. *U.S.*, 362 U.S. 257 (1960); *U.S.* v. *Cohen,* 388 F. 2d 464, C.A. 9 (1967).

B. THE FACTS

In its reply brief, Appellee, unable to explain away the overwhelming evidence of U. S. instigation of, and participation in, the raids of March 3, 1962, attempts to diminish the impact of this evidence (and at the same time to support an erroneous finding of the trial court) by suggesting that the raids were the result of a pre-existing Philippine investigation, allegedly begun by Philippine authorities sometime in 1960 for the purpose of deporting Appellants. The only support relied on by Appellee for this phantom investigation by Philippine authorities are references to one or more hearsay statements made by Senator Diokno in a deposition. Appellee, despite its excellent relations with the NBI, produced no documentary evidence, no details, no statement even, as to what charges, if any, had been investigated.

Nothing but vague hearsay, inadmissible in evidence and contradicted by the facts.

Appellee's entire brief relies primarily on Diokno*—a weak reed, indeed. For Diokno is a man whose motives for testifying** and credibility are clearly impeached on record.

There was no pre-existing Philippine investigation of Appellants. On the contrary, it was the United States which, since 1954, "had an interest" in Appellants and which, on January 9, 1960, when Diokno had hardly taken office, and before Lukban had lifted a finger, had decided to "get Appellants out of the Philippines and to keep them out" (Exh. E).

The Philippine investigation began in early February only after Colonel Lukban, who on January 27 was persuaded to initiate it, had received approval from Diokno to do so.

The actions of the U. S. agents in taking part in the planning of the raids, after having obtained an agreement to be given access to the fruits thereof, and their physical part in the raids while they were in progress were not—as Appellee urges—actions of innocent bystanders who, according to Appellee's brief, at worst were trying to accommodate a foreign government in unconstitutional actions against U. S. nationals. They constituted instigation of, and participation in, these illegal raids, in a manner shocking to the conscience of the Court and entitling Appellant to suppression.

ARGUMENT

A. THE LAW

1. Federal Participation Is Not Required To Be "Substantial", To Invoke the Exclusionary Rule

The trial Court initially intended to hold that the Fourth Amendment prohibits the use in federal Court of evidence obtained through an illegal search, regardless of whether

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* There are approximately 50 references to the Diokno deposition (Plaintiff's Exhibit 12) in the reply brief.

** Despite an attempt by U.S. officials to save him, Diokno was fired in early May by President Macapagal after (and because of) the raids (RT (878-880).

federal officers participated in such search* (274 F. Supp. at p. 426). Its denial of the motion to suppress was based solely on this Court's decision in *Brulay* v. *U. S.*, 345 F. 2d 383 (ibid.). But *Brulay* does not lay down any rule as to the amount of U.S. instigation of, or participation in, a foreign raid required to bring about application of the exclusionary rule, because in *Brulay* there truly was no Federal involvement of any kind, not even "bare" or "mere" participation by Federal officers in the Mexican search. Nevertheless, there are guidelines in this Circuit as to amount of participation required. They are not what Appellee contends them to be.

Corngold v. *U. S.*, 367 F. 2d 1 (C.A. 9, 1966), (search by TWA employees in which U.S. federal agents participated) provides one guideline. The facts in the instant case fit the *Corngold* pattern. (See Appellants' Opening Brief, beginning at p. 43). This Court's citing *Birdsell* v. *U.S.*, 346 F. 2d 775 in *Brulay* provides another: conduct of Federal officers abroad which will shock the conscience of a federal Court requires suppression. The conduct of the U.S. embassy contingent in Manila was certainly such that it must shock the conscience of this Court (See Chronology, Appendix, *infra*, Appellants' Opening Brief, p. 73).

But nowhere has this Court promulgated a rule even resembling the one contended for by Appellee, namely, that an agent of the United States must so "*substantially*" participate** in a non-federal raid as to convert the raid into a joint venture between the United States and the raider. Nowhere has this Court (or any other Court) ruled that, "as used in this sense, 'substantial' participation means: (1) that the federal agent is present at the initiation of the raid and seizure; (2) examines and sifts articles turned up by the search; and (3) in his discretion, decides on the seizure of evidence and his retention of it for use in a subsequent federal prosecution". (G.Br. 22).

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* See Appellants' Opening Brief, beginning at p. 25.

** In urging on this Court that there must be substantial participation, Appellee betrays a justified lack of confidence in the lower Court's holding that there was no participation and no instigation on the part of the United States.

Nor do the cases cited by Appellee support its theory. A brief analysis so shows:

(i) *Byars* v. *U. S.*, 273 U.S. 28 (1927).

In *Euziere* v. *U. S.**, the Court citing and interpreting *Byars* said:

> "The test in all cases is did the federal authorities participate *in any way* in the search? The answer in each case must depend on the facts of the particular case. We must be realistic in our approach to the problem. There may be participation *although the federal agent was not present.* There may be participation even though the federal agent was present. There must in all cases be good faith conduct. *If by tacit agreement or by a course of conduct, it is understood or becomes apparent that the result of a search by state officers is to be turned over to the federal agents, then they participate in the search as fully as though they actively participated therein.*" (Emphasis supplied.)—266 F. 2d at p. 90

This is the true and only criterion under Byars: DID THE FEDERAL AUTHORITIES PARTICIPATE IN ANY WAY?

(ii) *Lustig* v. *United States,* 338 U.S. 74, (1949) 69 S. Ct. 1372.

In *Lustig* the city police gathered up the evidence and eventually turned it over to the Federal officer at police headquarters. (69 S. Ct. at 1373). The Supreme Court held that "it surely can make no difference whether a state officer turns up the evidence and hands it over to a Federal agent . . . or the Federal agent himself takes the articles out of the bag. It would trivialize law to base legal significance on such differentiation." (Ibid., 1374). *Byars* and *Lustig* certainly are not authority for Appellee's theory of "substantial" participation. If they are, then the facts in the instant case spell "substantial" participation under Appellee's theory. Appendices B and C of Appellants' Opening Brief so show beyond a reasonable doubt.

(iii) *Sloane* v. *U. S.*, 47 F. 2d 889 (C.A. 10, 1931).

As in *Brulay, supra,* a Federal officer's call to State police—not "actuated" by an intention to initiate a State

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* 266 F. 2d 88 (CA 10, 1959).

search—was not considered participation or instigation although the case was held to be "very close to the line."

The instant case went over and beyond the line.

(iv) *Myers* v. *U. S.*, 49 F. 2d 230 (C.A. 4) is not in point. The search was a legal rather than an illegal search and the prosecution was for a crime committed the day before the search.

(v) In *Shurman* v. *U. S.*, 219 F. 2d 282, as in *Brulay,* narcotics were seized by a State officer outside of any Federal officer's presence after a "tip-off" by Federal officers. The tip preceded the search by seven days. There was no evidence of tacit understanding or custom of cooperation between State and Federal authorities.

(vi) In the two District Court cases, *U. S.* v. *Evans,* 179 F. Supp. 834, and *U. S.* v. *Brown,* 151 F. Supp. 441 (E.D. Va.), evidence was turned over to the Federal officers after the State search. The Federal officers were not present at the search for the purpose of obtaining evidence.

Appellee's authorities simply do not support its theory. None of them speak of "substantial" participation or mention Appellee's criteria for such substantial participation. By citing cases in which Appellee's criteria were absent, Appellee wants this Court to assume that suppression was denied *because* of their absence. This negative-type argument is hardly persuasive.

A great number of authorities, however, clearly and positively spell out that the criteria contended for by Appellee need not be present to invoke the exclusionary rule of the Fourth Amendment.

Forty-one years ago the Supreme Court urged all federal courts to

> "be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods."—Byars v. U. S., 273 U. S. 28 (1927) at p. 32.

In so doing, it did not require the courts to look for "substantial" participation, a joint venture, federal presence, or any one of the other criteria urged by Appellee. It commanded that the exclusionary rule applied in all cases of federal involvement in non-federal searches with

a very limited exception: where the facts do not go beyond "MERE", or "bare" participation.

A plethora of other cases, preceding and following *Byars* in time show the fallacy of Appellee's theory; a few follow:

No Physical Presence of Federal Agent at Location of Raid Is Required Before Suppression Can Be Granted.

(a) *Flagg* v. *U. S.*, 233 F. 481 (C.A. 2, 1916). Arrest by municipal police, who seized defendant's books and records *outside the presence of any Federal officer. After* the seizure, books and records were carted to the Federal building and turned over to Federal officials who worked on them for 18 months, as did Ragland and Powers in the instant case.

(b) *U. S.* v. *Falloco,* 277 F. 75 (DC WD Mo., 1922). No physical presence of Federal officers in the illegal State search: the illegal evidence was turned over to the Federal officers after the search had been concluded.

(c) *Legman* v. *U. S.,* 295 F. 474 (C.A. 3, 1924), City police officers alone made entry. After the search was completed, Federal Prohibition agents entered. The Court held that it was "obvious" that the Federal agents had been informed of what was transpiring and suppressed evidence taken earlier by the State officers and then turned over to the Federal agents.

(d) In *Fowler* v. *U. S.,* 62 F. 2d 656 (C.A. 7, 1932), no Federal officer physically participated in the local search. Evidence was suppressed because of a "general understanding" with Federal Prohibition agents to cooperate and to divide prosecutions.

(e) In *Sutherland* v. *U. S.,* 92 F. 2d 305 (C.A. 4, 1937), the Court, interpreting *Byars,* held that a mere understanding between State and Federal officers, permitting the latter to prosecute offenses which the former discover in an illegal State search was sufficient participation to require suppression, despite lack of physical presence in search by Federal officers. To the same effect are *Gambino* v. *U. S.,* 275 U.S. 310, 48 S. Ct. 137 (1927) and *Ward* v. *U. S.,* 96 F. 2d 189 (C.A. 5, 1938).

(f) In *Anderson* v. *U. S.*, 318 U.S. 350, 63 S. Ct. 599 (1943), the Supreme Court said that *Byars* did not require Federal officers to be "formally guilty of illegal conduct", and suppression was required where "[t]here was a working arrangement between Federal officers and the Sheriff . . . which made possible the abuses revealed by [the] record".

The Federal Agent Need Not Personally Examine, Sift, or Seize Evidence

(a) In *Waldron* v. *U. S.*, 219 F. 2d 37 (C.A.D.C. 1955), evidence seized by State police was suppressed in Federal Court on the authority of *Byars* and *Lustig,* purely because Federal officers "had a hand in [the illegal search] and participated in it as Federal enforcement officers upon the chance that something would be disclosed of sufficient interest to them". [pp. 39-40].

(b) In *U. S.* v. *Hallman,* 365 F. 2d 289 (C.A. 3, 1966), the FBI agent did not make *any* physical search or seize evidence. The evidence was selected and seized by the State officer, yet was suppressed in the Federal Court on the authority of *Byars.*

The Federal Agent Need Not Initiate the Search.

In *Lustig* v. *U. S., supra,* the Supreme Court said:

> "To differentiate between participation from the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in Byars v. United States, supra."

No further argument is required to show that the Federal officer need not be present at the beginning of the search or initiate it.

2. Rule 52(a) Does Not Preclude Review by This Court

In *Stevenot* v. *Norberg,* 210 F. 2d 615 (1954), this Court said:

> "When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate

> court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions. . . .''—p. 619

The instant appeal primarily concerns the legal effect of the events of record. The lower Court's holding that there was no instigation and participation constitutes a legal determination which this Court may review. In *Lustig* v. *U. S.*, supra, the Supreme Court reviewed *de novo*, whether facts held by the trial and appellate Courts not to constitute federal participation, did, in fact, constitute such participation so as to make the exclusionary rule apply.

Nor is this Court required to accept a trial Judge's findings which are based on secondary or derivative inferences which the trial Judge inferred from the testimony. *American Tobacco Co.* v. *The Katingo Hadjipatera,* 194 F. 2d 449. (C.A. 2, 1951).

Where testimony is adduced by deposition, the appellate Court is in as good a position as the trial Court to evaluate such testimony. *Equitable Life Assurance So. of U. S.* v. *Irelan* (C.A. 9, 1941), 123 F. 2d 462. Appellee's brief relies heavily on the Diokno deposition. This Court has held in *Equitable Life Assurance So. of U. S.,* supra, that it actually has a burden to review findings of fact that might be based on a deposition.

As shown in Appellants' Opening Brief and in this Reply, many of the facts found by the trial Court (as, for instance, that there was an antecedent deportation investigation) are clearly erroneous and not supported by any credible evidence. A complete review of all the lower Court's findings of fact and conclusions of law, therefore, is permitted and indicated in this case.

3. Suppression Lies in Civil Cases

The question whether suppression lies in civil cases is not before this Court. Appellee did not seriously contest applicability below and the trial Court correctly held that the exclusionary rule applies to civil cases (274 F. Supp. at p. 425). Appellants' Opening Brief, beginning at p. 23, shows that decisional trend and government policy support the holding.

Militare v. *Scanlon* (E.D. N.Y.) 17 AFTR 2d 776 (1966) and *Compton* v. *U. S.*, 334 F. 2d 212 (C.A. 4) are not in point. They are cases where a tax assessment was sought to be quashed. The motion under review is not a motion to set aside the assessment herein, but to suppress evidence. If the motion is sustained, Appellee may still attempt to establish a tax liability by untainted evidence.

Walder v. *U. S.*, 347 U.S. 62 (1954) is cited for a novel proposition: it is urged as authority permitting Appellee to use tainted evidence to contradict Appellants' extra-judicial statements on their tax returns. *Walder* permits no more than impeachment of the *credibility* of a defendant who has taken the stand, by illegal but contradictory evidence. It does not, by any stretch of interpretation, permit the use of tainted evidence to disprove or determine a central and substantive issue of the case.

The Supreme Court's decisions in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964); *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); *Marchetti* v. *U. S.*, 88 S. Ct. 697 (1968); and *Grosso* v. *U. S.*, 88 S. Ct. 709 (1968), have deprived *Walder* of a great deal of its vitality. (See dissenting opinion of Judge Keating in *People* v. *Stanley Kulis*, 18 NY 2d 318, 221 NE 2d 541, 542.) Because of the clear inapplicability of *Walder* to the instant case, no further argument on this point is needed.

4. The "Standing" Issue

Space limitations do not permit extended argument on this point. The issue was not effectively raised below or waived. In any event, Appellants have "standing" in the instant case regardless of what individual documents are sought to be suppressed. *Jones* v. *U. S.*, 362 U.S. 257 (1960); *Berger* v. *State of New York*, 87 S. Ct. 1873 (1967), 388 U.S. 41; *See* v. *City of Seattle* (1967), 87 S. Ct. 1737; *U. S.* v. *Cohen*, 388 F. 2d 464 (C.A. 9, 1967).

B. THE FACTS

A reading of appellee's argument on the facts shows that Appellee is unable to deny the large scale Federal involvement that spells U. S. instigation and participation in these raids. Appellee has introduced two "red herrings"

to lessen the impact of these facts: (1) that the U. S. did not start its tax investigation of Appellants until after the raids—thoroughly refuted in Appellants' Statement in Reply, *supra;* and (2) that there was an antecedent deportation investigation by the Philippine authorities*.

Because Appellee relies so heavily on the Diokno deposition, a few words have to be said about this deposition and the deponent.

The deposition was first admitted over Appellee's objections. (Tr. 1112). Later the Court procured consent of Appellants' Counsel to its admission without full reading in Court. Appellants' Counsel conditioned this consent on the Court's observing Appellants' objections on the record of the deposition (Tr. 1198).

Most, if not all of the testimony relied on in Appellee's brief was elicited by leading questions, was objected to and was incompetent as hearsay or conclusions.

To appreciate fully the lack of evidential value of this deposition, this Court must also consider the circumstances under which the deposition was procured and the fact that despite constant pressure by U. S. representatives in Manila, Diokno never signed the deposition. For more than a month Diokno refused to do so, without explanation (Tr. 36). After another two weeks, he was finally persuaded to withdraw his refusal and to substitute a waiver of signature (Pl's. Exh. 12, Certificate).

Diokno carries a long-standing personal grudge against Appellants for many reasons, including his having been dismissed by President Macapagal after, and because of the raids (RT 878) and his having been made a defendant in the Philippine litigation (Exh. AW). An ultra-Nationalist, he was, after many futile attempts, induced by Appellee's Counsel to give a deposition, only after he was shown a pleading filed by Appellants in a related case. The contents of the pleading irritated the Senator because

---

* Even if there had been antecedent investigation of Appellants, it would be irrelevant in view of the holding in *Lustig* v. *U.S.*, *supra*, that it is immaterial *when* the Federal agent joins in the non-Federal enterprise. Also, the trial court may have been confused by references to a 1959 NBI investigation of another American, Ted Lewin. There is some evidence that during the Lewin investigation, NBI Director Lukban picked up Stonehill's voice on a telephone tap. (Tr. 79).

it described him as cooperating with the United States. He so admitted in his deposition and testified that Appellee's Counsel's showing him this pleading was his motivation to testify (Pl's. Exh. 12, pp. 176-177).

Diokno's credibility was thoroughly impeached. He was shown a press release (Df's. Exh. 9 to Diokno Dep'n) that he had personally authored a short time earlier, in which he denied publicly that his meeting in Hong Kong was arranged by American agents and that he had discussed the projected raids on Stonehill with Kennedy's assistant. These and other facts, denied by Diokno in his press release and again denied during the deposition, were finally admitted by him on cross-examination (Pl's. Exh. 12, pp. 165-167).

We need not cite any authority for the proposition that this Court in evaluating Diokno's testimony should consider the impeachment of his testimony on a material issue, his motives, his reluctance over a period of several months to sign the deposition, and his final failure to sign it although he originally had insisted on his right to make changes therein (Pl's. Exh. 12, p. 181).

Diokno's testimony, inadmissible, vague and biased, must be disregarded entirely, leaving most of Appellee's argument without support in the record.

CONCLUSION

For the reasons set out in Appellants' Opening Brief and in this Reply Brief, and for such other and further reasons as may be urged on this Court at the oral argument of this appeal, it is respectfully urged that an Order be entered reversing the holding of the Trial Court and directing that Appellants' Motion to Suppress be granted in its entirety.

TRAMMELL, RAND & NATHAN
and BERTRAM H. ROSS,

By HANS A. NATHAN and
BERTRAM H. ROSS
Attorneys for Appellants.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

BERTRAM H. ROSS

APPENDIX

CHRONOLOGY OF EVENTS

APPENDIX

Chronology of Events

Sometime in 1954

Internal Revenue's interest in Appellant Stonehill begins. During, and because of investigation of another U.S. taxpayer residing in Manila (Lewin), the U.S. Internal Revenue Service (IRS) accumulates file on Appellants Stonehill and Brooks in Manila and in Washington.

August, 1960

IRS, Office of International Operations in Washington, at the request of the Department of Justice, assigns Appellant Stonehill's 1958 tax return for audit to the Manila IRS office.

1961

October, November, 1961

Appellants are outside the Philippine Islands prior to, and during Philippine Presidential elections.

Approx. December 10

Informer Spielman contacts CIA representative at the U.S. Embassy in Manila (Tr. 750).*

December 16

Spielman gives statement to Consul General and Political Section of the Embassy (Exh. E).

December 17

Spielman gives statement to FBI agent Hawley and turns over to him approximately 100 documents, allegedly obtained clandestinely from Stonehill's files.

December 18

Spielman is interviewed by Agent Chandler, who makes copies of Spielman documents. Thereafter Chandler sees Spielman daily, gathering information re: Appellants' tax liabilities.

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* Tr. references in this chronology are made only if item was not previously referred to in briefs by either party.

December 22

After constant conferences with Spielman, Chandler reports to Washington that tax case against Stonehill should be made and asks for Revenue and Special Agents to be sent to Manila to assist him.

Between December 24, 1961 and December 31, 1961

NBI Director Lukban hears rumor about Spielman, inquires, but is given no information.

1962

January 9, 1962

Highest U.S. Embassy official in Manila determines as a matter of Embassy policy "to get [appellant] Stonehill out of the Philippines and to keep him out". Manila IRS (Chief Chandler needs a "spectacular" tax case to improve IRS enforcement image in the Far East, asks for experienced Special Agents to be dispatched to Manila immediately, since case against Appellants promises to be suitable for this purpose, but investigation requires additional staff.

January 10, 1962

Chandler reports to Washington that he and Hawley have "extracted all [they] could from the informant [Spielman]". Chandler and Hawley realize that what they have is "not very good evidence".

Between January 10 and January 17, 1962

Hawley and Chandler realize that "any investigation that you do through local sources abroad, you do as a matter of cooperation and permissiveness" rather than as a matter of "right and jurisdiction" (RT 1210) and that they, therefore, can go no further in gathering evidence in the Philippines. They persuade Spielman to tell his story to the NBI so as to cause action to be taken by this agency.

January 27, 1962

Secret meeting is set up at Embassy. Informer Spielman has been persuaded to tell story to NBI Director Lukban and Assistant Director Nocon.

January 27, 1962

Lukban *promises* to inquire and to investigate, but only if he could find corroboration of Spielman's story (Tr. 143).

February 1, 1962

Secret meeting is arranged at private (Columbian) club for Chandler (IRS), Hawley (FBI) and Lukban (Philippine NBI), with new Secretary of Justice Diokno. Chandler tells Diokno that U.S. has a tax case but no evidence (Tr. 158-159). Diokno does not want to "stick his neck out" by procuring evidence and demands meeting with U.S. Attorney General Kennedy.

February 4, 1962

Spielman is introduced to Secretary Diokno.

February 5, 1962

Diokno, at Lukban's request, goes to President Macapagal of the Philippines because Spielman demands assurance of investigation of Appellants from the President in exchange for his continued cooperation (Pl's. Exh. 12, pp. 14, 15, 16).

Beginning January 27, and throughout February until March 3, 1962

Daily and sometimes twice daily, meetings between U.S. agents and Philippine agents, including at times Informer Spielman, mostly held at U.S. Agent Chandler's home, discussing "modus operandi" of raids, location of documents, etc.

Approximately February 6, 1962

Secretary Diokno tells his Executive Assistant, Major Del Rosario that if any proceedings are taken against

Stonehill, they would be taken in order to help Americans make a tax case (Tr. 836). The Filipinos were not interested in a tax case (Tr. 848). Diokno insists that no action be taken until after his return from Hong Kong (Tr. 840-842).

Between February 6 and February 10, 1962

Chandler and Hawley arrange Diokno-Kennedy meeting.

February 10, 1962

Secretary Diokno leaves for Hong Kong for meeting with Attorney General Kennedy. He meets Kennedy's Executive Assistant Seigenthaler; insists on simultaneous raids in New York before authorizing searches "outside ordinary government channels" in the Philippines (Tr. 164; Df's. Exh. AZ).

February 12, 1962

Secret cable, regarding agreements reached in Hong Kong, sent by H.K. Consulate to U.S. Department of Justice, State Department, Manila Embassy and Internal Revenue Service, Washington Office of International Operations. Cable indicates that Manila searches will be authorized by Secretary Diokno (Df's. Exhs. F, AZ). Washington dispatches Ragland and Powers to Manila.

February 12, 1962

Washington telephones Chandler in Manila that requested agents are being dispatched (Tr. 238; 257 to 259; Exh. G).

February 13, 1962

Diokno returns from Hong Kong.

During February 1962

Chandler urges delay of searches until U.S. agents can get to Philippines.

February 24, 1962

Original target date for raids. Raids are postponed to give U.S. agents time to get to Manila. (Tr. 986).

Between February 12 and March 2, 1962

Chandler prepares written sketch of two Stonehill company buildings with instructions as to where to search and what to seize (Exh. J); NBI prepares picture folder of locations to be raided and Chandler writes memorandum of comments to this picture folder and instructions of how to conduct searches in locations shown on photos. (Exh. I).

Sometime prior to March 3, 1962

Chandler obtains assurance from Philippine NBI Director that records will be made available to the U.S. agents for copying as they are received. (Tr. 1004, 1005).

Between February 24 and March 2, 1962

Revenue Agent Ragland arrives from Washington and is instructed to familiarize himself with the case and obtains photographic equipment for photographing Stonehill documents expected to be seized on March 3.

March 2, 1962

Ragland is advised that the raids will take place on March 3 (Saturday) and is instructed to be at his hotel at 1:00 p.m. to be picked up by Chandler.

Late evening of March 2, into early morning of March 3, 1962

Search warrants and applications therefor are being typed by Lukban's assistant director Nocon at Lukban's private home; Chandler attends this briefing session, approves language of search warrants describing financial records to be seized and personally

suggests search be conducted for Stonehill papers at Army-Navy Club (Room 304), which location was not contemplated to be searched by the Philippine agents.

March 3, 1962, 8:00 a.m.

Secretary Diokno asks his undersecretary, as *ex officio* Chairman of the Deportation Board, to sign deportation warrants for arrest of Appellants. Deportation proceedings are selected as the mode of arrest so that Appellants will not get out on bail and interfere with searches.

March 3, 1962 beginning at 8:00 a.m.

Between 30 and 40 substantially identical search warrants are obtained from three Judges by agents who previously had no information about the case. All search warrants are later held illegal and void by the Supreme Court of the Philippines and by the U.S. District Court for the Central District of California.

March 3, 1962, about 1:00 p.m.

Appellants are arrested. Chandler and Revenue Agents Reynolds and Ragland are stationed at prearranged location (Arson Squad Building) near main NBI building. The illegal searches begin and include Room 304 Army Navy Club.

Sometime after 1:00 p.m.

Chandler observes raids on private office of Stonehill and Brooks (former Cuban Embassy) from neighboring apartment house. (Tr. 392, 393, 394).

March 3, 1962, between 1:00 p.m. and 10:00 p.m.

U.S. agents Ragland and Reynolds wait at NBI Arson Squad Building, carrying photographing and copying equipment. Chandler drives to the various raid locations but returns to to NBI Arson Squad Building from time to time.

March 3, 1962, 10:00 p.m.

The U.S. agents are called to Colonel Lukban's NBI office. They are told that the raids are still in progress and shown the first material that was seized (Tr. 400, 401). Chandler, Reynolds and Ragland drive to Stonehill-U.S. Tobacco warehouse with an NBI agent. They go and examine records there and segregate what they "thought was important" (Tr. 406; 531, 532). Chandler searches the entire place, but spends most of his time in the record vault. Tells NBI agent to bring records picked out by U.S. agents to NBI Headquarters.

March 3, 1962, approximately midnight

Chandler, Ragland and Reynolds drive to the main office of the Stonehill-Brooks U.S. Tobacco company because "NBI's execution of the raids was handled in disorganized manner". Chandler goes into the main building and points out to NBI team leader location of records. Location is subsequently searched and records are seized from location pointed out by Chandler.

March 3, 1962, after midnight

Chandler stops by Stonehill-Brooks office located in Cuban Embassy and gets report from Assistant NBI Director Nocon as to results of search (Tr. 423, 424).

March 4, 1962, Sunday

Party at FBI agent Robert Hawley's home, with Philippine and U.S. personnel present, at which party Chandler boasts about his selection of Room 304 at Army Navy Club as search target. (Tr. 427).

March 5, 1962, Monday morning between 9:00 and 10:00 a.m.

Chandler takes U.S. Revenue agents Ragland and Reynolds to NBI Director. Ragland and Reynolds are given office in NBI building to begin inspection and copying of seized documents.

March 5, 1962, 10:00 a.m. through 7:30 p.m. and every working day thereafter until sometime subsequent to March 5

Agents Ragland and Reynolds inspect and copy documents at NBI building. Records are moved to a separate building "contributed" by American businessman (Tr. 429, 430).

March 8, 1962

Special agent Powers arrives in Manila and case is assigned to him (Tr. 433).

Subsequent to March 8, 1962

Chandler, Powers and Ragland obtain Philippine NBI badges, assuring them access to building (Tr. 1159) and continue photographing and microfilming records seized during searches for months thereafter.

No. 22,346

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HARRY S. STONEHILL and ROBERT P. BROOKS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Central District of California.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Appellants, Harry S. Stonehill and Robert P. Brooks, respectfully request a rehearing in the above entitled cause, decided by a panel of this court pursuant to opinion filed December 9, 1968, and in this connection request that a rehearing of this case be held before the entire court en banc, in that this case involves an important question of constitutional law.

Grounds of Petition.

The following are the grounds upon which this petition is based:

(a) The majority of the court in its opinion of December 9, 1968 erroneously made findings of fact upon an uncontradicted record, which findings are con-

trary and different than those of the trial judge, and the Record.

(b) The majority opinion herein is in conflict with the decision of the Court of Appeals for the District of Columbia in *Powell v. Zuckert,* 366 F. 2d 634, which, although cited in appellants' briefs, is not mentioned in the majority opinion.

(c) The majority opinion of December 9, 1968 deprives United States nationals living abroad of Fourth Amendment rights in United States courts within the territorial limits of the United States.

ARGUMENT.

A. The Majority of the Court in Its Opinion of December 9, 1968, Erroneously Made Findings of Fact Upon an Uncontradicted Record, Which Findings Are Contrary and Different Than Those of the Trial Judge, and the Record.

The majority opinion limits suppression to actual physical participation by United States agents in the raids wherein the material sought to be suppressed was obtained. If on this record there can be a finding that there was no instigation or participation by United States agents, then one man can hand another man a gun and tell him to kill a third individual and completely escape legal responsibility.

After Spielman, the informer, appeared at the Embassy and told his story important United States officials at the Embassy alerted Washington by and through the sealed Exhibit E of the nature of the case and the desire to get sufficient evidence to make a tax case against appellant Stonehill and to bring Stonehill's deportation from the Philippines. Following this message to Washington agents Chandler and Hawley worked hand in glove with the Philippine officials and were always present at their meetings with Spielman. The evidence shows that Spielman would not talk to the Philippine officials without an American representative. Most of the planning for the raids was done in Chandler's home and at the two meetings between Chandler and Minister of Justice Diokno Chandler told Minister Diokno that he wanted to make a tax case against Stonehill of the net worth type and that he needed books and records for this purpose. The majority opinion states that the diagrams prepared by Chandler, Exhibits I and J, inadvertently came into the possession of Philippine officials. The district judge did not so

find and Mr. Chandler's testimony indicates that he prepared the diagrams with the assistance of Spielman and that the diagrams were used during the raids by the National Bureau of Investigation of the Republic of the Philippines. In connection with the use of the diagrams by the Philippine raiders Mr. Chandler testified:

> "Q. And you did this to help the raiders, is that correct? A. I presume that would probably be used in the raids, yes." [R. T. 366, lines 21-23].

Chandler and other agents were active during the course of the raids and actually went to certain of the locations that were raided and selected books and documents which contained material in which they were interested. There is no conflict in the record on this.

The inferences and implications from the foregoing testimony are patent. Chandler just couldn't stay away from any place where there were financial records that would help him in his tax case and he did not want to miss any bets through the inefficiency of the Philippine officials and wanted to be sure to obtain everything that Spielman told him was available. It is our considered view that upon a full consideration of the evidence in this case appellants have presented evidence which overwhelmingly establishes that United States agents instigated and participated in the raids, the fruits of which appellants are attempting to suppress in this proceeding.

The narrow view taken by the majority overlooks the overwhelming evidence in this case that the United States desired to prosecute Stonehill in a tax case, as outlined in Exhibit E; it further overlooks the fact that the United States did not have sufficient evidence from Spielman to so proceed, so took Spiel-

man by the arm to the Philippine officials and by causing the Philippine authorities to embark upon the raids secured the evidence that could not otherwise be acquired. This in our opinion, plus the physical presence of Chandler at the places raided, constitutes participation.

The court in the opinion of the majority filed December 9, 1968 made findings of fact. As the dissenting opinion notes at page 22 thereof, the trial court's findings were inadequate and the majority undertook to fill the gaps with *de novo* fact finding of its own. As the dissenting opinion further points out, for this reason alone, the case should be remanded to the trial court for further consideration and the entry of adequate findings.

B. The Majority Opinion Herein Is in Conflict With the Decision of the Court of Appeals for the District of Columbia in Powell v. Zuckert, 366 F. 2d 634, Which, Although Cited in Appellants' Briefs, Is Not Mentioned in the Majority Opinion.

While the majority opinion agrees that the raids conducted by the Philippine officials were illegal under the laws of the Philippines, the majority holds that the evidence that was obtained by and through those illegal raids is admissible, as it was obtained by United States agents from Philippine officials in a lawful manner. The majority is also mindful of the fact that had said evidence been obtained in the same manner within the territorial limits of the United States it would be inadmissible and subject to suppression. The majority rejected the doctrine of *Birdsell v. United States,* 346 F. 2d 775, which indicates that if the method of obtaining the evidence is shocking to the con-

science, the court within its inherent jurisdiction can suppress it. It is our view that if that doctrine was ever applicable, it certainly applies to the facts in this case.

In reaching the opinion that it did the majority failed to consider *Powell v. Zuckert, supra,* which involved evidence obtained in Japan under Japanese law which was used against a civil service employee of the United States wherein the Court of Appeals for the District of Columbia applied the Fourth Amendment rights to the employee and in citing *Reid v. Covert,* 354 U.S. 1, the court, at page 640, stated:

> "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on Congress or any other branch of the government, which is free from the restraints of the Constitution."

This court's opinion in *Brulay v. United States,* 383 F. 2d 345, has no applicability to the facts of this case. In *Brulay* this court relied on *Birdsell v. United States, supra.* One of the grounds for the *Birdsell* decision was the failure of the appellant in that case to raise the suppression issue as a pre-trial motion, as provided for in F.R.C.P. 41(e). In our case we are here in this court on an appeal from an adverse order on just such a motion. The second basis for distinguishing *Birdsell* is that there is no finding therein as to whether the Mexican search and seizure was illegal under Mexican law. A complete basis for distinguishing *Birdsell* from the case at bar is found in the court's own language at page 783, where the court stated:

> "Apart from the inapplicability of the Fourth Amendment to a country whose laws may not even provide, much less require, the counterpart of a search warrant, the record would afford a fair basis for a finding of consent."

Thus, as in *Brulay*, *Birdsell* is based upon the validity of the search and seizure under foreign law. In our case the search and seizure was found to be illegal by the highest court of the Republic of the Philippines and the court below found that the search was illegal by United States standards, so therefore, we have illegality under foreign law as well as illegality under United States law. In our case there is no suggestion of consent, but to the contrary, violent objection.

C. The Majority Opinion of December 9, 1968 Deprives United States Nationals Living Abroad of Fourth Amendment Rights in United States Courts Within the Territorial Limits of the United States.

This case involves an extremely important question of constitutional law encompassing the protection to be afforded in United States courts by the Fourth Amendment to a United States citizen living abroad, where the United States government seeks to utilize evidence seized in a foreign country, which seizure admittedly violated both the constitution of the foreign country where the seizure took place and the United States Constitution.

The majority of this court in its opinion of December 9, 1968 clearly failed to apply the doctrine of *Elkins v. United States,* 364 U.S. 206, as enunciated by the Supreme Court, under which the court, relying on its supervisory power, held that any evidence illegally seized under Fourth Amendment standards is inadmissible in a United States Court.

This court, in effect, has held that if a United States citizen living abroad is subject to an illegal search and seizure by a foreign nation and the courts of that nation find that search and seizure to be illegal, the fruits of

said search can be used in a United States court by the United States government. To so hold makes the Fourth Amendment a mere shibboleth and not one of our prized rights. Even if this court were to hold that a citizen of the United States living abroad cannot avail himself of Fourth Amendment rights, such a doctrine of law, which we seriously question in view of the decision in *Powell v. Zuckert, supra,* would not be applicable to the facts of this case. The highest court of the sovereign nation in which the searches and seizures occurred held that the same were illegal. The case at bar is one where the United States is attempting to offer this illegally secured evidence in a United States court against a citizen of the United States afer he has returned from abroad. As pointed out in the dissenting opinion, the majority has misconstrued the "silver platter" doctrine which was laid to rest in *Lustig v. United States,* 338 U.S. 74. To hold that because the United States citizen did not have Fourth Amendment rights abroad and therefore the tainted evidence is admissible would make the Constitution of the United States and the Bill of Rights a sham, farce and mockery and would further encourage the Internal Revenue Service to erode fundamental rights (see the decision of this court in *Lenske v. United States,* 383 F. 2d 20).

If the doctrine of *Brulay, supra,* means what the majority opinion seems to indicate, then a citizen of the United States when he resides abroad not only loses his constitutional rights under the Constitution of the United States, but also loses the rights to which he is entitled while he is living in a foreign country, for in the case at bar, the Philippine Supreme Court held that the search warrants against these appellants were illegal and void, and of course the district judge in this case held that said search warrants were illegal and void under the Constitution and laws of the United

States. Does the decision of this court mean to hold that both United States constitutional rights and foreign rights are abrogated merely because a United States citizen is temporarily living abroad? We do not think that that is the law nor that this court seriously desires to so hold.

The legal issue presented here is of the utmost importance. The majority opinion has completely eroded Fourth Amendment rights of United States citizens living abroad. This court has held that although the evidence obtained abroad was illegal under the laws of the country in which it was obtained and was illegal under the laws of the United States it still is admissible against United States citizens in United States courts. We do not think that this court by its decision in *Brulay, supra,* intended such a result and it is our view that this court cannot seriously adopt such a view in the case at bar. It seems to us that the decision of the Court of Appeals for the District of Columbia in *Powell v. Zuckert, supra,* contains the correct answer to this problem.

Conclusion.

It is respectfully submitted that appellants should be granted a rehearing and said rehearing should be before the entire court sitting en banc, to the end that the order of the district judge may be reversed.

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and
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Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

BERTRAM H. ROSS